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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-229

ARMEN DE FILIPPO and SHELDON FLEISHMAN
t/a A & S, *a Partnership*,
Petitioners,

v.

FORD MOTOR COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Page
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting Petition	8
I. The Holding of the Third Circuit, that an Exclusionary or Anti-Competitive Purpose Is a Requisite of a Group Boycott under Section 1 of the Sherman Act, Is in Direct Contravention of the Holdings of This Court and is in Conflict With a Decision of the Ninth Circuit	8
A. The Decision of the Court of Appeals Directly Contravenes the Decisions of This Court	8
B. The Decision of the Third Circuit in This Case is in Conflict With a Decision of the Ninth Circuit Court of Appeals	10
II. The Court of Appeals, in Violation of the Seventh Amendment to the Constitution and the Decisions of This Court, has Ignored a Jury Finding of an Anti-Competitive Purpose	11
III. The Court of Appeals Has Formulated a Major Exception to the Group Boycott Doctrine, in Conflict With the Decisions of This Court and of Another Circuit Court	15
A. The Court of Appeals' Decision Contravenes Prior Decisions of this Court	15

Page

B. The Court of Appeals' Decision is in Conflict With a Decision of the Fifth Circuit 18

IV. The Court of Appeals' Decision Emasculates the Group Boycott Prohibition and Violates the Public Policy Underlying the Sherman Act 19

Conclusion 21

Appendix A — Opinion and Judgment of the United States Court of Appeals for the Third Circuit, Filed May 8, 1975 ..... 1a

Appendix B — Order of the United States Court of Appeals for the Third Circuit denying rehearing in banc, Filed June 10, 1975 ..... 25a

Appendix C — Opinion of the United States District Court for the Eastern District of Pennsylvania, Filed June 14, 1974 ..... 27a

Appendix D — Seventh Amendment to the Constitution of the United States 59a

Appendix E — Section 1 of the Sherman Act, 15 U.S.C. 1 ..... 61a

TABLE OF CITATIONS

Cases:

Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972) 10

Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 (1962) 14

Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941) 9

Cases:

Page

Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) 11

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. den.*, 396 U.S. 1062 (1970) 10, 12

Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951) 17

Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 10, 19

North Texas Producers' Ass'n v. Young, 308 F.2d 234 (5th Cir. 1962), *cert. den.* 372 U.S. 929 (1963) ..18, 19

Northern Pacific Ry. v. United States, 356 U.S. 1 (1958) 8, 19

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 16, 17, 19

United States v. General Motors Corp., 384 U.S. 127 (1966) 8, 9, 17, 19

United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. den.*, 409 U.S. 1125 (1973) 10, 11

United States v. Topco Associates, 405 U.S. 596 (1972) 13

Constitution:

United States Constitution:
Amendment VII 11

Statute:

Sherman Act:
Section 1 (15 U.S.C. 1) 8

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The Plaintiffs-Petitioners, Armen De Filippo and Sheldon Fleishman, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit reversing the District Court's entry of judgment for Plaintiffs. The judgment of the Court of Appeals was entered in this proceeding on May, 8, 1975, and rehearing in banc was denied on June 10, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A herein) is reported at 1975 Trade Cases ¶60,319. The Court's Order denying rehearing in banc (Appendix B herein) is not yet officially reported. The opinion of the District Court for the Eastern District of Pennsylvania (Appendix C herein) is reported at 378 F.Supp. 456.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1975, and a petition for rehearing in banc was denied on June 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is the holding of the Court of Appeals, that an exclusionary or anti-competitive purpose is a requisite of a group boycott under Section 1 of the Sherman Act, in direct contravention of the decisions of this Court and in conflict with a holding of the Ninth Circuit Court of Appeals?

2. Did the Court of Appeals, in ignoring a finding of the jury of an anti-competitive purpose, violate Plaintiffs' Seventh Amendment right to a trial by jury and the prior decisions of this Court?

3. Did the Court of Appeals, in holding that the Sherman Act protection against group boycotts applies only to group action which deprives a competitor of terms which were made available to the members of the group, carve out an exception to the group boycott doctrine which is in conflict with the decisions of this Court and of the Fifth Circuit Court of Appeals?

4. Does the decision of the Court of Appeals emasculate the group boycott prohibition and violate the public policy underlying the Sherman Act?

CONSTITUTIONAL PROVISION INVOLVED

Seventh Amendment to the United States Constitution.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1.

STATEMENT OF THE CASE

I. *Factual Background*

The antitrust claim in Plaintiffs' Complaint charged that Ford and its Philadelphia area dealers had conspired to prevent Plaintiffs from becoming dealers at a Ford dealership located in Philadelphia, known as Presidential Motors (21a-22a), and that in so doing Ford and its dealers had engaged in a concerted refusal to deal, or "group boycott", a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1 (33a-37a, 42a-43a). The evidence adduced at the trial in support of this claim was the following.

Plaintiffs became Ford dealers at Chestnut Motors, Inc. ("Chestnut") in Philadelphia early in 1969 under a "dealer development" arrangement in which Plaintiffs put up 20% ($60,200) and Ford put up 80% of the investment required to purchase the dealership from the previous dealer. As is typical under a "dealer development" arrangement, Plaintiffs were to buy out Ford's investment with the dealership's profits, if any.

Plaintiffs operated Chestnut for 8½ months until a fire destroyed a portion of the facilities. Whereas Chestnut had been losing substantial sums under its prior management, it made a net profit of slightly over $100,000 during the 8½ months under Plaintiffs' operation (P-100 151ex). Shortly after the fire, persons in the Ford Philadelphia District Office suggested to Plaintiffs that instead of rebuilding Chestnut and resuming normal operations there, Plaintiffs take over the operation of Presidential Ford ("Presidential"), a company-owned dealership which, under various managers, had lost large sums of

money. Plaintiffs' reaction was that they would prefer to rebuild Chestnut, where they knew they could operate profitably, rather than take over Presidential, which they knew had been unprofitable in the past. The Ford personnel assured Plaintiffs that Ford would make the terms of the deal for Presidential sufficiently attractive that Plaintiffs could do at least as well as Presidential as they had at Chestnut, and, based upon these assurances, Plaintiffs agreed to permit Chestnut to be dissolved and to take over the operation of Presidential (53a-61a).

Extensive negotiations followed, during which Ford offered Plaintiffs certain terms intended to make the Presidential proposal financially viable. These terms included a deferred rent plan and a deferred investment period (whereby Plaintiffs were to have a 3-month "turnaround" period as managers of Presidential before their money was to be invested). A Ford representative drafted a "Buy-Sell" Agreement (P-115 160ex) containing the terms agreed upon, which was shown to Plaintiffs and approved by them (80a-85a). A meeting was then held December 18, 1969, which Plaintiffs were told was for the purpose of formally executing the Buy-Sell Agreement they had previously been shown and approved. At the December 18 meeting, Plaintiffs were told that the deferred rent provision of the Agreement was subject to approval by Ford Leasing Co., a separate division of Ford. Plaintiffs objected, but then agreed to that condition. Plaintiffs signed the Agreement, subject to the condition, and the documents were held in escrow pending approval by Ford Leasing (85a-92a). On December 29, 1969 Ford Leasing sent a telegram (P-73 115ex) approving the deferred rent, and Plaintiffs were advised that the date they would commence operations at Presidential was January 5, 1970 (99a-101a).

Unknown to Plaintiffs, certain other Ford dealers in close proximity to Presidential, and particularly Pacifico, Matthews and McGowen, had become aware that Plaintiffs were going to take over the Presidential operation and

complained about it to the Ford District personnel and to Ford's Dealer Policy Board in Detroit. The complaints took the form of threats to resign their dealerships if Ford completed the Presidential deal with Plaintiffs (186a, D-64, 276, 286ex). The ostensible basis of the complaints was that the terms of the agreement between Ford and Plaintiffs constituted "special concessions" to Plaintiffs. At trial, however, it was established that the objecting dealers recognized these terms were essential if Plaintiffs were to be successful at Presidential, and that their real motive was to eliminate Presidential as a competitor, or at least eliminate Plaintiffs on terms where they might be successful (182a-183a, 185a, 600a-601a, 409a, 418a-419a, 595a). Rather than tell Plaintiffs of the threats and their possible effect on Plaintiffs' takeover of Presidential, Ford told Plaintiffs that there was a "temporary hold" caused by technical problems which would soon be eliminated (101a-102a).

On January 7, 1970, Wiggins, Regional Sales Manager, was sent by Ford to meet with Pacifico, the acknowledged leader of the complaining dealers, to try to convince him that the terms of the deal with Plaintiffs were fair and not special concessions. Wiggins was authorized to offer the same deferred rent plan to Pacifico and the other dealers, which he did. Pacifico rejected Wiggins' offer of a deferred rent plan and persisted in his objections (P-75 117ex).

On January 9, 1970 Naughton, Vice President of Ford, met with the objecting dealers and heard their objections and threats. Although Ford considered the deal with Plaintiffs both reasonable and desirable to Ford (388a-389a), Naughton advised the dealers that, rather than face a group of angry dealers, he would kill the deal with Plaintiffs (183a-186a, 533a-534a, P-76 121ex). After the meeting, Matthews, a principal objecting dealer, wrote Naughton and confirmed the "agreement" reached at that meeting, one of the terms of which was stated to be that "the present deal with . . . [Plaintiffs] is a dead issue

and that Ford will continue to operate this facility as a Company Store until arrangements can be made to sell the location to a qualified buyer" (D-42 266-267ex). Plaintiffs were then notified that Ford would not go through with the Presidential deal upon the terms set forth in the documents at the December 18, 1969 meeting (p-76 122-123ex).

Thereafter, Plaintiffs were told by Ford that unless they signed a document releasing Ford from liability arising out of the Presidential transaction, their Chestnut franchise would be terminated and instead of getting their equity out of Chestnut as of the date of the fire, in which event Plaintiffs would receive approximately $85,000, their equity would be determined as of the end of the year, in which event Plaintiffs would receive nothing, because of the losses incurred while Chestnut was being liquidated in anticipation of the move to Presidential (107a-108a, 110a-115a). Plaintiffs refused to sign a release, and for that reason their Chestnut franchise was terminated (P-94 134ex). Plaintiffs, therefore, not only did not get the Presidential dealership, but their Chestnut dealership was taken from them, and they received nothing from the liquidation of Chestnut—not even their original $60,000 investment.

II. *Jury Findings*

The District Court posed a series of special interrogatories to the jury. The jury's answers which are relevant to the issues before this Court are the following:

> 1. The jury found that Plaintiffs and Ford entered into a contract on December 18, 1969 for the acquisition of Presidential Motors and its operation by Plaintiffs as franchised Ford dealers, which was contingent only upon approval of the deferred rent terms by a subsidiary of Ford, which approval was communicated to Plaintiffs on December 29, 1969. (Answer to Special Interrogatory No. 16, 827a-828a.)

2. The jury found that Ford's failure to deal with Plaintiffs on the terms set forth in the documents signed on December 18, 1969 was the result of a contract, combination or conspiracy entered into between Ford and the Philadelphia area Ford dealers. (Answer to Special Interrogatory No. 1, 823a.)

3. The jury found that the agreement between Ford and its dealers constituted an "unreasonable restraint of trade." (Answer to Special Interrogatory No. 3, 823a.) This finding, construed in the context of the definition of "unreasonable restraint of trade" contained in the charge of the trial judge (680a), constituted a finding that the agreement between Ford and its dealers had the purpose of stifling competition and was reasonably calculated to substantially restrict competition.

4. The jury found that the agreement between Ford and its dealers was a substantial factor in bringing about damages to Plaintiffs in the amount of $750,000. (Answers to Special Interrogatories Nos. 4 and 5, 824a.)

III. *Opinion of the District Court*

The District Court ruled that the jury's answers to Special Interrogatories established the existence of a group boycott, and therefore, a *per se* violation of Section 1 of the Sherman Act. Accordingly, the District Court entered judgment for Plaintiffs in the amount of $2,250,000 and denied Ford's motions for judgment n.o.v. or, in the alternative, for a new trial.

IV. *Opinion of the Court of Appeals*

The Court of Appeals, relying upon the language of the Ninth Circuit Court of Appeals in the case of *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. den.*, 396 U.S. 1062 (1970),

held that an exclusionary or anti-competitive purpose is a requisite of a group boycott, and that the jury findings failed to establish the existence of the requisite "illicit purpose" (App. A, p. 13a). The Court further held that, as the result of concerted action, Plaintiffs ". . . were deprived simply of the benefits of a contract offered to them at special terms" (App. A, p. 15a), which, the Court concluded, did not constitute a violation of Section 1 of the Sherman Act. Accordingly, the Court of Appeals reversed the District Court's judgment for Plaintiffs and entered judgment n.o.v. for Ford.

REASONS FOR GRANTING PETITION

I. The Holding of the Third Circuit, that an Exclusionary or Anti-Competitive Purpose Is a Requisite of a Group Boycott under Section 1 of the Sherman Act, Is in Direct Contravention of the Holdings of this Court and Is in Conflict with a Decision of the Ninth Circuit.

A. *The Decision of the Court of Appeals Directly Contravenes the Decisions of this Court.*

Group boycotts, or concerted action resulting in a refusal to deal, were first recognized by this Court as one form of *per se* violation of Section 1 of the Sherman Act in *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958). The most recent case in which this Court dealt with a group boycott was *United States v. General Motors Corp.*, 384 U.S. 127 (1966). There, an auto manufacturer and its franchised dealers had conspired to deny nonfranchised (*i.e.*, discount) auto dealers access to new Chevrolets. The District Court had held that the concerted action did not constitute a group boycott and, therefore, was not a *per se* violation of the Sherman Act, because its *purpose* was not to eliminate the discounters, but to preserve General Motors' distribution system. On direct appeal, this Court reviewed its prior holdings and reversed the District Court, saying:

> "The principle of these [group boycott] cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, *we need not inquire into the economic motivation underlying their conduct.*" (*Id.* at 146). (Emphasis added).

The principle, that the purpose or motivation of a group is irrelevant to the existence of a prohibited group boycott, had been clearly enunciated previously by this Court in *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941). In that case the Guild attempted to justify its group boycott on the ground that the boycott was aimed at preventing "style piracy", which the Guild's members regarded as a tort. This Court rejected that contention, holding that evidence of the purpose behind the boycott was irrelevant and, therefore, had been properly excluded in the proceedings below.

Notwithstanding the clear precedents of this Court, the Court of Appeals in the instant case held that:

> ". . . a concerted activity constitutes a 'group boycott' and is considered *per se* 'in restraint of trade' *when 'there [is] a purpose* either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both.'" (Emphasis added). (App. A, p. 11a).

In holding that a specific purpose is a requisite of a group boycott, and in entering judgment n.o.v. because an "illicit purpose" had not been established, the Third Circuit flatly contravened the decisions of this Court. We respectfully submit, therefore, that it would be appropriate for this Court to reverse the Court of Appeals *per curiam*, and to reinstate the judgment of the District Court upon the citation of the *General Motors* and *Fashion Originators' Guild* cases, *supra*.

B. *The Decision of the Third Circuit in This Case is in Conflict With a Decision of the Ninth Circuit Court of Appeals.*

The only authority upon which the Court of Appeals based the above holding was language which it quoted from a decision of the Ninth Circuit Court of Appeals, *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (1969), *cert. den.*, 396 U.S. 1062 (1970). In citing *Seagram* as its authority, however, the Third Circuit overlooked the fact that *Seagram* was an exclusive distributorship case, a situation this Court has recognized to be *sui generis*: See *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959). The Third Circuit itself had previously recognized this distinction and had cited *Seagram* as standing for the proposition that: ". . . a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed to the seller's termination of A." (*Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 [3rd Cir. 1972]).

Moreover, the Third Circuit overlooked the fact that the quoted language of *Seagram* has not even been adhered to by the Ninth Circuit, which authored it, in a non-exclusive distributorship situation. Just two years after *Seagram*, the Ninth Circuit decided *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (1972), *cert. den.*, 409 U.S. 1125 (1973). In the *Hilton* case, the defendant contended that certain concerted action did not constitute a group boycott because its *purpose* was not exclusionary or anti-competitive. The Ninth Circuit rejected this contention, stating:

> "But the necessary and direct consequence of defendants' scheme was to deprive uncooperative suppliers of the opportunity to sell to defendant hotels in free and open competition with other suppliers, and to deprive defendant hotels of the opportunity to buy supplies from such suppliers in accordance with the individual judgment of each hotel, at prices and on terms and conditions of sale determined by free competition. Defendants therefore 'intended' to impose these restraints upon competition in the only sense relevant here." (467 F.2d at 1002).
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> * * * * *
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> "The Sherman Act is aimed at consequences. Specific intent is not an element of any offense under the Act except attempt to monopolize under section 2, and conscious wrongdoing is not an element of that offense." (467 F.2d at 1005).

Thus, the decision of the Third Circuit in this case is not only in direct contravention of the decisions of this Court, it is also in conflict with a decision of the Ninth Circuit, upon whose authority the Third Circuit ostensibly relied.

II. The Court of Appeals, in Violation of the Seventh Amendment to the Constitution and the Decisions of this Court, Has Ignored a Jury Finding of an Anti-Competitive Purpose.

After erroneously concluding that this Court's decisions require an exclusionary or anti-competitive purpose, the Court of Appeals held that Plaintiffs' case failed because the jury had not found such a purpose. In so doing, the Court ignored a clear finding of the jury that such a purpose existed, and thereby violated the Seventh Amendment to the United States Constitution and prior holdings of this Court.

In *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 121-22 (1963), this Court held that a jury's answer to a special interrogatory must be looked at "in the context of the charge." Here the trial judge submitted Special Interrogatories to the jury and his Charge "tracked" the Inter-

rogatories; *i.e.*, in his Charge he instructed the jury he would submit a certain interrogatory to them and then he defined the terms used in that interrogatory to aid the jury in answering it. The third Interrogatory (which the jury was to answer only if it had found an agreement between Ford and its dealers) asked whether that agreement "constituted an unreasonable restraint of trade" (823a).

In his Charge the trial judge defined "unreasonable restraint of trade" as follows:

> "The antitrust laws are intended to stimulate competition for the benefit of the public. They are intended to ban any restraints which have the substantial purpose or effect of stifling competition. Therefore, restraints which have substantial purpose or effect of restraining competition are unreasonable restraints.
>
> "In determining whether an unreasonable restraint of trade exists you must decide whether the conduct in question substantially restricted or otherwise controlled free and open competition among Ford dealers in the Greater Philadelphia area, and in determining whether or not such an unreasonable restraint exists you need not find a specific public injury, but you must find that the conduct in question was reasonably calculated to substantially restrict or otherwise had the effect of restricting competition." (680a).

When the jury's "Yes" answer to Interrogatory No. 3 is looked at "in the context of the charge" of the trial judge, as this Court has held it must be, that answer is a clear finding that the agreement between Ford and its dealers had the "substantial purpose . . . of restraining competition." Thus, there *was* a jury finding of an anti-competitive purpose, thereby meeting the criteria of the *Seagram* case which the Third Circuit adopted.[1]

1. There was ample evidence to support the jury's finding of an anti-competitive purpose: *e.g.*, (1) the objecting dealers had attempted to get Ford to close Presidential altogether and had obtained for Ford a purchaser for the site who would use it other than as a car dealership (409a, 595a, 600a-601a, D-64, 287ex); (2) the other dealers not only objected to Ford selling Presidential to Plaintiffs, but they objected to Ford permitting Plaintiffs to reopen their prior dealership, Chestnut Motors (D-64, 286ex, 596-597a); and (3) some of the very dealers, who threatened to resign their dealerships if Ford went through with the deal with Plaintiffs for Presidential, had attempted to get Ford to sell Presidential to them, on terms far more favorable to them than the terms of Ford's deal with Plaintiffs (590a, 550a, 552-553a, 186a).

The Court of Appeals, however, refused to consider the jury's answer to Interrogatory No. 3 as a finding in support of the establishment of a group boycott, stating (App. A, p. 12a):

> ". . . plaintiffs' case was tried strictly on a theory of *per se* illegality and not under the 'rule of reason'. Thus, the district court held, and the parties agreed, that Interrogatory No. 3 was improvidently submitted to the jury."

This is not an accurate statement of what transpired at the trial and, in any event, would not justify the Court in ignoring its duty to construe the answers to Interrogatories in the context of the charge of the trial judge.

It is true that when the trial judge submitted to counsel the Interrogatories he proposed to submit to the jury, both counsel objected to his submitting Interrogatory No. 3 on the ground that the case had been tried on the theory of *per se* rather than "rule of reason" liability. The *reason* Plaintiffs' counsel objected was they assumed the trial judge would define "unreasonable restraint of trade" in terms of the "rule of reason" cases, which would have required Plaintiffs to produce evidence of "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries." (*U.S. v. Topco Associates*, 405 U.S. 596, 607 [1972]), something Plaintiffs had not attempted to do. Instead, the trial judge defined "unreasonable restraint of

trade" substantially in the language of the *Seagram* case, which language the Third Circuit here adopted.

Thus, what we have is the Court of Appeals adopting the test of the *Seagram* case, but rejecting the jury's answer to an Interrogatory which found that Plaintiffs had met that test. This is not only directly contrary to a prior holding of this Court which requires a reviewing court to construe answers to interrogatories "in the context of the charge" of the trial judge, but is a violation of the Seventh Amendment to the Constitution.

The Seventh Amendment provides that ". . . no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." In *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 358-59 (1962), this Court held the Seventh Amendment to mean that an appellate court cannot "redetermine facts found by the jury"; and in *Gallick v. Baltimore & Ohio R. Co., supra*, this Court stated that a jury's finding of fact "whether it relates to negligence, causation or any other factual matter, *cannot be ignored*." (372 U.S. at 155) (Emphasis added). Here, the Court of Appeals explicitly ignored the jury's finding on a factual issue which the Court itself had found to be relevant.

In summary, even if the Third Circuit had been correct in determining that proof of an anti-competitive purpose is necessary in a group boycott case, Plaintiffs were deprived of their Constitutional right to a trial by jury when the Third Circuit failed to read the jury's finding in the context of the trial judge's Charge, and as a result ignored the jury's finding of an anti-competitive purpose.

III. The Court of Appeals Has Formulated a Major Exception to the Group Boycott Doctrine, in Conflict with the Decisions of This Court and of another Circuit Court.

A. *The Court of Appeals' Decision Contravenes Prior Decisions of This Court.*

In this case the Third Circuit, in addition to improperly holding that a specific purpose is a requisite of a group boycott, has also propounded a major exception to the group boycott prohibition, namely, that a group boycott is legal if it seeks to deprive a competitor of "special" terms which he has negotiated with a supplier; *i.e.*, that a group boycott is illegal *only* if it seeks to prevent a competitor from dealing with a supplier on substantially the same terms as group members enjoy. Specifically, the Third Circuit held:

> "Distilled to its essence, the group activity of Ford and its Philadelphia area dealers blocked only the 'special terms' arrangement between Ford and plaintiffs. Whatever common law right of action against the other Ford dealers for interference with a contract may have accrued to plaintiffs, the concerted action did not constitute a group boycott in the sense of a *per se* unreasonable restraint of trade. Plaintiffs were not deprived of the opportunity to become a Ford dealer or to purchase products on the same basis as other dealers. *They were deprived simply of the benefits of a contract offered to them at special terms. Such a deprivation, even if the product of concerted action, does not violate §1 of the Sherman Act.*" (App. A, p. 15a) (Emphasis added).

The Court of Appeals cited *no case in any court* holding that a distinction can or should be made between "special" deals or contracts and standard ones, or that only the latter are protected against group boycotts. Apparently the Court believed that all prior group boycott cases of this

Court dealt with standard opportunities, and thus, that the *per se* doctrine did not extend to protect businessmen who, as the result of concerted action, were denied the benefits of "special" deals.

The decisions of this Court dealing with group boycotts, however, do not suggest that it is appropriate for the courts to consider whether the opportunities of which a plaintiff is deprived by group action were equally available to his competitors. Rather, the opinion in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), is to the contrary. Plaintiff in that case was a stock broker dealing in the over-the-counter market. He had installed private telephone wires to member firms of the New York Stock Exchange in order to facilitate business with such firms. When, as the result of concerted action, the Exchange ordered its members to rip out these connections, this Court said:

> "These important *business advantages* were taken away from petitioners by the group action of the Exchange and its members. Such 'concerted refusals by traders to deal with other traders . . . have long been held to be in the forbidden category' . . . ." (373 U.S. at 348). (Emphasis added).
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>
> "Nor does any excuse derive from the fact that the collective refusal to deal was only with reference to the private wires, the member firms remaining willing to deal with petitioners for the purchase and sale of securities [citations omitted]. A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act." (373 U.S. at 348, note 5).

This Court in *Silver* was not concerned with whether other traders had been offered (or allowed to retain) direct

wires to Exchange member firms on equal terms with the plaintiff. Indeed, this Court referred to the direct wires of which plaintiff was deprived as "business *advantages*"—*i.e.*, special terms enjoyed by plaintiff but not by all of his competitors.

In its most recent group boycott case, the *General Motors* case, *supra*, this Court reviewed its prior decisions and enunciated their rationale in these words:

> "The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct." (384 U.S. at 146).

By its decision in this case, the Third Circuit has in effect rewritten this Court's opinion in *General Motors* by inserting the words "*on equal terms*" after the words "deprive others of access to merchandise".

Such a rewriting is inconsistent not only with the *Silver* case, but with this Court's decisions involving another *per se* violation of Section 1 of the Sherman Act: price fixing. In that field, this Court has repeatedly beaten down attempts to justify the fixing of prices—even maximum prices—on the ground that:

> ". . . such agreements . . . cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951).

The freedom of the Plaintiffs in this case to contract "in accordance with their own judgment" was not merely crippled, but annihilated, by the group boycott. Deprivation of economic freedom constitutes a *per se* violation of the Sherman Act whether it takes place because of price fixing or because of a group boycott.

B. *The Court of Appeals' Decision is in Conflict with a Decision of the Fifth Circuit.*

The decision of the Third Circuit in this case is also in conflict with the decision of the Fifth Circuit in *North Texas Producers' Ass'n v. Young*, 308 F.2d 234 (5th Cir. 1962), *cert. den.*, 372 U.S. 929 (1963). There, Young planned to go into business selling milk in one-gallon glass containers in the Dallas, Texas, area, whereas his competitors were all selling milk in half-gallon paper cartons. He contracted with the local milk producers association to sell him milk in one-gallon glass jugs. The association then refused to deal with Young under the terms of the contract because of pressure from other milk handlers and distributors in the area. In upholding a jury verdict for plaintiff against the challenge that he had only been deprived of a "special" deal, the Fifth Circuit said:

> "Factually, it is difficult to conceive how it may be logically argued that Young was seeking some special privilege or advantage not available to his competitors. It is not a special privilege or advantage to enter into the type of contract executed by Young and North Texas. To make a contract may be a privilege and certainly, the parties to it hope it will be advantageous, but we see nothing 'special' involved here. Further, *no valid reason has been given to indicate that the same privilege or advantage was not available to other handlers and distributors of milk. From aught that appears, they did not desire such a contract; or if so, no effort was made to obtain one.*" (308 F.2d at 241). (Emphasis added).

Exactly the same words should have been used by the Third Circuit to uphold the jury verdict in the instant case. There was nothing "special" about Ford's contract with Plaintiffs, nor was there anything to indicate that the other Ford dealers desired a contract comparable to Plaintiffs' or that they had made an effort to obtain one. Indeed, the

record is clearly to the contrary. The evidence in Ford's own case established that: (a) the other dealers rejected Ford's offer of substantially equal rental terms with respect to their own dealerships (P-75 119-120ex); and (b) when Presidential was offered to the other dealers, those who expressed interest in Presidential were interested only upon terms far more favorable to them than the terms of Ford's deal with Plaintiffs (550a, 552-553a). Far from trying to prevent the Plaintiffs from obtaining an unfair competitive advantage over them, the group members were trying to prevent the Plaintiffs from competing at all at the Presidential dealership.

In summary, this Court has never limited the group boycott prohibition to cases where a competitor is denied "standard" terms for goods or services it wishes to purchase. The clear implication of this Court's language in the *Silver* and *General Motors* cases, *supra*, is that *any* denial of goods and services brought about by pressures of competitors constitutes a group boycott in violation of the Sherman Act. In deciding to the contrary, the Third Circuit is also in conflict with the Fifth Circuit, which decided the *North Texas* case, *supra*.

IV. The Court of Appeals' Decision Emasculates the Group Boycott Prohibition and Violates the Public Policy Underlying the Sherman Act.

Since this Court, in *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958), first enunciated the doctrine that a group boycott is a *per se* violation of the Sherman Act, there have been a series of unsuccessful attempts by the lower federal courts to emasculate the group boycott prohibition. Thus, in *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *United States v. General Motors Corp.*, 384 U.S. 127 (1966), the lower courts had carved out major exceptions to the application of the group boycott

doctrine. In each instance, however, this Court struck down those attempts and preserved the vitality of the doctrine. The decision of the Third Circuit in this case represents yet another attempt to emasculate the group boycott doctrine, and, we submit, should be treated in the same manner as prior attempts.

In holding that an "illicit purpose" is a requisite of a group boycott, and that the protection against group boycotts does not extend to "special" deals or arrangements, the Third Circuit has virtually eliminated the group boycott as an effective method of enforcing the Sherman Act. Every would-be antitrust violator can, and does, conjure up a praiseworthy motive for his conduct. By imposing a requirement of an "illicit purpose" the Third Circuit has erected a mountainous obstacle before a plaintiff attempting to prove a group boycott—one which this Court has held he need not climb.

Additionally, by holding that the protection against group boycotts extends only to regular arrangements and not to "special" arrangements, the Third Circuit has placed the lone businessman at the mercy of coercive conduct by his powerful and well organized competitors. Inasmuch as real estate has traditionally been viewed as unique or special, and inasmuch as many business arrangements involve the sale or lease of real estate, a great many commercial relationships would be subject to attack by a group boycott if "special" deals were not subject to Sherman Act protection. In the instant case, the primary point of the attack by Plaintiffs' competitors was the lease between Plaintiffs and a subsidiary of Ford. The building which Plaintiffs were to occupy was unique, and *any* provision for its sale or lease to Plaintiffs would similarly have been unique or "special", and thus, under the Third Circuit's rationale, immune from protection against group boycotts.

The other element of the deal between Plaintiffs and Ford which the group objected to was a term "special" to every agreement, whether or not it concerns real estate—the date for the investment of Plaintiffs' funds; *i.e.*, the date

of payment of the purchase price by the buyer. Since there is no standard interim period between the signing of a purchase agreement and the closing, the length of the interim period can always be considered a "special" term—and thus subject to concerted attack by competitors under the Third Circuit's ruling in this case.

The public policy underlying the Sherman Act is the encouragement of free and open competition among all businessmen. The decision of the Third Circuit runs afoul of that policy, however, by permitting a group of businessmen to exercise their collective muscle to deprive a competitor of the benefits of a business opportunity he has earned, and to justify their concerted action by saying that they had merely prevented him from gaining a business advantage over them. Such a result, we submit, is so contrary to the letter and spirit of the Sherman Act that this Court should exercise its certiorari power to prevent it from occurring.

CONCLUSION

For the foregoing reasons it is respectfully urged that a Writ of Certiorari be granted.

Respectfully Submitted,

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Appendix A—Opinion and Judgment of the United States Court of Appeals for the Third Circuit, Filed May 8, 1975

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1877 and 74-1878

ARMEN DE FILIPPO and SHELDON FLEISHMAN
t/a A & S, a Partnership

v.

FORD MOTOR COMPANY, a Delaware Corporation
PRESIDENTIAL FORD, INC., a Delaware Corporation
FORD LEASING DEVELOPMENT CO., a Delaware Corporation,

FORD MOTOR COMPANY, *Appellant* in No. 74-1877

ARMEN DE FILIPPO and SHELDON FLEISHMAN
t/a A & S, a Partnership,
Appellants in No. 74-1878

v.

FORD MOTOR COMPANY, a Delaware Corporation
PRESIDENTIAL FORD, INC., a Delaware Corporation
FORD LEASING DEVELOPMENT CO., a Delaware Corporation.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.
(District Court Civil Action No. 70-1003)

Argued March 17, 1975

Before: ALDISERT, GIBBONS and GARTH, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 8, 1975)

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ALDISERT, *Circuit Judge.*

Cross appeals from a judgment entered after a jury's answers to special interrogatories require us to decide whether the district court erred (1) in applying a principle of *per se* unreasonableness to conduct of Ford Motor Company and certain Philadelphia area Ford dealers allegedly in violation of § 1 of the Sherman Act and (2) in applying

the Pennsylvania Statute of Frauds to defeat plaintiffs' recovery for breach of contract. We reverse the district court's resolution of the Sherman Act issue and affirm its action in interpreting the Uniform Commercial Code's Statute of Frauds.

Ford appeals from a judgment of $2,250,000 plus attorneys' fees of $384,357 entered for plaintiffs on a count charging that Ford and its Philadelphia dealers engaged in a concerted refusal to deal with plaintiffs, which constituted a *per se* violation of § 1 of the Sherman Act.[1] Plaintiffs Armen De Filippo and Sheldon Fleishman appeal from the entry of judgment for defendant as a matter of law on the count alleging breach of contract by Ford for the sale of a Ford dealership known as Presidential Motors.

I.

Plaintiffs became Ford dealers at Chestnut Motors, Inc. in West Philadelphia in 1969. Less than nine months later part of the facilities, leased from the previous dealer, was destroyed by fire. Thereupon plaintiffs and Ford discussed the possibility of plaintiffs' acquiring another dealership in the city. On December 18, 1969, plaintiffs signed an instrument, found by the jury to be a contract, according to which they were to purchase the assets, less realty, of Presidential Motors. The real estate was to be leased by plaintiffs from Ford. The instrument also contemplated that plaintiffs would be credited with the value of their interest at Chestnut undiminished by the fire;[2] that no risk capital would be invested by plaintiffs for an original period of three (3) months, after which they would put in twenty per cent (20%) of the capital; and that plaintiffs

1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

15 U.S.C. § 1 (1970).

2. It is unclear whether the amount assigned to this value was approximately $85,000 or $100,000. *Compare* Appellant's Brief at 4 and Appellees' Brief at 6 *with* N.T. 475. The discrepancy in the figure, however, need not detain us as it is immaterial to our resolution of the issues.

would defer payment of fifty per cent (50%) of the first year's rent and twenty-five per cent (25%) of the second year's rent until the fourth and fifth years of the dealership.

When news of the proposal reached other Philadelphia area Ford dealers, they protested to Ford the delayed investment and deferred rent provisions. Ford's legal department advised Ford that the deferred rent provision was unacceptable unless also offered to other dealers, obviously fearing a conflict with the Robinson-Patman Act.[3] Thereafter Ford's representatives discussed the possibility of deferred rent plans with other dealers. Ford even considered the purchase and lease-back of dealer-owned real estate so that the deferred rents could be offered to all dealers. Significantly, it is clear from the record that any implementation of the plans was contingent upon acceptance of plaintiffs' proposal.

Further problems, however, were posed by dealers who did not wish to sell to and lease back from Ford, and by dealers who believed that they might be injured as a result of the delayed investment feature of the Presidential proposal. Ultimately, therefore, the vice-president and general manager of Ford travelled to Philadelphia, announced to the Philadelphia dealers that Ford would not consum-

3. 15 U.S.C. § 13 (1970):

. . .

(d) Payment for services or facilities for processing or sale.

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

mate the Presidential proposal with plaintiffs, and instructed the Philadelphia sales manager that he had no objection to plaintiffs' assuming the Presidential dealership without the delayed investment and deferred rental terms. Plaintiffs made no response to an offer to discuss such a deal. They then filed this lawsuit, including a Sherman Act count, a count for breach of contract, and a count asserting a violation of the Automobile Dealers' Day in Court Act.[4]

After the jury answered special interrogatories, the court entered judgment for plaintiffs on the Sherman Act count. Based on the jury's responses, the court also entered an initial judgment for plaintiffs on the contract claim. However, it thereafter "molded" a verdict for Ford, ruling as a matter of law that the lack of Ford's signature rendered the instrument unenforceable against Ford for noncompliance with the Statute of Frauds provision of the U.C.C. relating to sale of goods.[5] The jury

4. 15 U.S.C. § 1222 (1970). Authorization of suits against manufacturers; amount of recovery; defenses.

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

5. PA. STAT. ANN. tit. 12A, § 2-201 (1970). Formal Requirements; Statute of Frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

found a violation of the Dealers' Day in Court Act, but also found plaintiffs sustained no damages therefrom.[6]

II.

In order to apply the provisions of the Sherman Act to the facts as found by the jury, it is first necessary to consider the teachings of the Supreme Court. On its face § 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." The necessity for some sort of narrowing interpretation of this language was pointed out by Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), where he observed that "[*e*]*very* agreement concerning trade, every regulation of trade, restrains." (Emphasis added). As the Court has explained through Mr. Justice Black, the result has been that "the courts have construed [§ 1] as precluding only those contracts or combinations which 'unreasonably' restrain competition." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

In certain situations the Court has presumed the required "unreasonableness"; that is, the Court has determined that the situations constitute *per se* violations of § 1. As explained by Mr. Justice Black:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without

5. (Cont'd.)

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

. . .

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606).

6. The court directed a judgment in favor of the two other named defendants.

> elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . . Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392.

Ibid.

Addressing the specific type of activity upon which plaintiffs relied to bring this case within the ambit of *per se* unreasonableness, the Court teaches:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.[5] They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with

5. See, *e.g.*, *Eastern States Lumber Assn. v. United States*, 234 U.S. 600; *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291; *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625; *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5.

> their own judgment." Cf. *United States v. Patten*, 226 U.S. 525, 542.

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

The inquiry in any case seeking to apply this rule of *per se* unreasonableness must be whether or not the activities of defendants properly fall within the "group boycott" categorization. The necessity for careful delineation of the boundaries of this *per se* category was aptly expressed in *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119, 125 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974):

> The term "group boycott" . . . is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the "group boycott" and "per se" labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed.

Accordingly, we have reviewed the case law employing the group boycott concept.

In *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, 312 U.S. 457 (1941), the members of a large association of textile and garment manufacturers refused to sell to certain retailers. The clear purpose of the combination was the "intentional destruction of one type of manufacture and sale which competed with Guild members." *Ibid.* at 467. In addition, the Court noted the "many respects" in which the activities of the Guild ran afoul of the policies of the antitrust laws, including their "tendency to monopoly." *Ibid.* at 465, 467.

In the early case of *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), a national organization of motion picture film distributors, deciding not to sell to an exhibitor, "put an end to his participation in that business." *Ibid.* at 311.

Klor's, supra, also involved exclusion of a dealer from the market. In that case manufacturers and distributors of electrical appliances allegedly had conspired with a major retailer, Broadway-Hale, either not to sell to Klor's or to sell to it only at discriminatory prices, and had taken from Klor's "its freedom to buy appliances in an open competitive market and drive[n] it out of business as a dealer in the defendants' products." 359 U.S. at 213. The Court further emphasized that the group activity alleged was "not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship," *ibid.* at 212, but rather a "wide combination consisting of manufacturers, distributors and a retailer." *Ibid.* at 213.

Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914), involved the attempted coercion of wholesalers by an association of lumber retailers who refrained from dealing with those wholesalers that were selling directly to consumers.

More recently in *United States v. General Motors Corp.,* 384 U.S. 127, 146 (1966), the Court has instructed that "[t]he principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct." There, the agreement was to eliminate sales by General Motors' dealers to discounters. The Court emphasized that "inherent in the success of the combination . . . was a substantial restraint upon price competition . . . ." *Ibid.* at 147.

Kiefer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951), also involved a restraint upon price competition. The complaint charged an agreement or conspiracy "to sell liquor only to those . . . wholesalers who would resell at prices [below maxima] fixed by [defendants], and that this agreement deprived [plaintiff] of a continuing supply of liquor." *Ibid.* at 212. The Court reinstated a judgment for plaintiff.

From all this we are able to conclude that a concerted activity constitutes a "group boycott" and is considered *per se* "in restraint of trade" when "there [is] a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970), cited with approval in *Ark Dental Supply Co. v. Cavitron Corp.,* 461 F.2d 1093, 1094 (3d Cir. 1972) (per curiam).

III.

In the case at hand the district court submitted the issue of antitrust liability to the jury by three special interrogatories and the jury answered as follows:

1. Do you find that the plaintiffs have established by a preponderance of the evidence that Ford's failure to deal with the plaintiffs on the terms set forth in the documents signed by plaintiffs on December 18, 1969, was the result of a contract, combination or conspiracy entered into between Ford and the Philadelphia area Ford dealers?

   Yes X No ____

   If you have answered question 1 "Yes", then proceed to answer question 2.

   If you have answered question 1 "No", then proceed to answer question 7 [which concerned plaintiffs' claim under the Automobile Dealers' Act].

2. Do you find that plaintiffs have shown by a preponderance of the evidence that the purpose of the agreement, if any, between Ford and its Philadelphia area dealers was to prevent plaintiffs from becoming Ford dealers in the greater Philadelphia area on any terms?

   Yes ____ No X

If you have answered question 2 "Yes", then proceed to answer question 4 [which concerned antitrust injury and causation].

If you have answered question 2 "No", then proceed to answer question 3.

3. Do you find that plaintiffs have shown by a preponderance of the evidence that the agreement, if any, between Ford and its dealers to reject plaintiffs' terms for the acquisition of Presidential's assets constituted an unreasonable restraint of trade?

Yes X No ____

If you have answered question 3 "Yes", then proceed to answer question 4.

If you have answered questions 2 and 3 "No", then proceed to answer question 7.

We quickly reject appellees' contention that the jury's affirmative answers to interrogatories Nos. 1 and 3 in this case constitute a sufficient factual finding by the jury to sustain the judgment of antitrust liability. Appellees' Brief at 16. The first interrogatory was clearly limited to the element of agreement; the jury found only a "contract, combination, or conspiracy entered into between Ford and the Philadelphia area Ford dealers." Second, plaintiffs' case was tried strictly on a theory of *per se* illegality and not under the "rule of reason". Thus the district court held, and the parties agreed, that interrogatory No. 3 was improvidently submitted to the jury.

Thus, the sole inquiry before the district court, as it is before us, was whether there is a factual basis for sustaining the contention that the combined action of Ford and the other Philadelphia dealers constituted a "group boycott", as that category has been defined by the teachings of the Supreme Court.

IV.

The jury found as a fact that the purpose of the combination was *not* "to prevent plaintiffs from becoming Ford dealers in the greater Philadelphia area *on any terms.*" (emphasis added). The district court properly observed:

> The present agreement did not appear to take from plaintiffs their access to Ford dealerships in an "open competitive market;" it merely prevented plaintiffs from acquiring a dealership on special terms. Nor did the present agreement seem to deprive Ford of its freedom to sell to plaintiffs "at the same prices and conditions made available to [its other dealers]."

DeFilippo v. Ford Motor Co., 378 F. Supp. 456, 463 (E.D. Pa. 1974).

The district court, however, apparently found the illicit purpose of the combination to emerge from (1) the withdrawal of the offer to plaintiffs of special terms for delayed investment capital and deferred rentals and (2) a finding by the court—and not by the jury—"that these terms, or substantially equal terms, were offered to the other dealers." *Ibid.* at 464; *see ibid.* at 466.

Even assuming the propriety, in a post-trial jural environment, of a trial court's assumption of a fact-finding role entrusted in the case at hand to a jury, the district court's fact finding simply cannot be sustained. It is not supported in the record.

The court found such support in an offer made to one Kerry Pacifico by Dennis Wiggins, the Ford regional manager, on January 7, 1970. Appellant effectively responds:

> It is this conversation of January 7 upon which Judge Newcomer placed primary reliance for his finding that Ford was willing to deal with plaintiffs' competitors on terms it rejected when proposed by plaintiffs [*ibid.* at 465]. He quoted from Wiggins'

testimony, but the key portion of the passage makes clear that Ford was willing to offer other dealers deferred rent *only* in the event that it first *accepted* plaintiffs' proposal:

> "Q. O.K., Well, this problem that you considered the most important one, the one about the deferred rent that *if you offered it to Armen and Shelley* you'd have to offer it to everybody?
>
> A. Yes.
>
> Q. Well, you kind of already had gone partway on that in your January 7th meeting with Mr. Pacifico. You'd already told him that *if the deal went through* with Armen and Shelley he could have the same deal and you'd buy his place?
>
> A. Yes." (618a-19a; emphasis added)

Wiggins' testimony does not establish, as the lower court suggests, that Ford was willing to grant rent concessions to other dealers but not to plaintiffs —or that Ford was unwilling to deal with plaintiffs on terms equal to those provided to other dealers. On the contrary, it shows that, to assure equal treatment of all dealers, Ford was willing to make the same rent concession available to them *conditional* upon Ford's acceptance of the deferred rent proposal made by plaintiffs.

Appellant's Brief at 14-15 (footnote omitted) (emphasis in brief).

Other evidence cited by the court in support of its conclusion, 378 F. Supp. at 465, that the deferred rent plan was re-offered to other dealers after plaintiffs' offer had been rejected does not withstand examination. That evidence consists of plaintiffs' repeated attempts to establish this point on cross-examination of a Ford dealer, James Matthews, with the witness' repeated response: "I do not recall . . . . I do not know. . . . I can't answer that. I

do not know. . . . I do not know, sir." Appendix at 422a-24a. A disavowal of knowledge may not serve as a legitimate substitute for positive evidence. Moreover, the statement that "[t]hey did have a rent-concession policy that they used under certain conditions, if it was in order . . . .", *ibid.* at 423a, is no more supportive of the district court's conclusion than Wiggins' testimony.

The district court erred in assuming a conclusion, contrary to the evidence adduced at trial, to support its legal determination of an illicit group boycott.

Distilled to its essence, the group activity of Ford and its Philadelphia area dealers blocked only the "special terms" arrangement between Ford and plaintiffs. Whatever common law right of action against the other Ford dealers for interference with a contract may have accrued to plaintiffs, the concerted action did not constitute a group boycott in the sense of a *per se* unreasonable restraint of trade. Plaintiffs were not deprived of the opportunity to become a Ford dealer or to purchase products on the same basis as other dealers. They were deprived simply of the benefits of a contract offered to them at special terms. Such a deprivation, even if the product of concerted action, does not violate § 1 of the Sherman Act. *See* Part II, *supra*. Having failed to prove their case, plaintiffs are not entitled to recovery and the judgment in their favor on the Sherman § 1 count will be reversed.

Since we determine that the district court erred in entering judgment for plaintiffs on the basic antitrust claim, we also must set aside the award of $354,357 in attorneys' fees. 15 U.S.C. § 15 (1970); *see Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649 (3d Cir. 1967).

V.

We next turn to plaintiffs' cross appeal urging as error the district court's ruling that any contract between plaintiffs and Ford was unenforceable under the Pennsyl-

vania Statute of Frauds because the instrument was not signed by Ford.

After several weeks of negotiations, the parties met on December 18, 1969. Plaintiffs had been under the impression the meeting would culminate in a contract for their acquisition of Presidential Motors. Instead, during the meeting they signed an instrument in letter form stating, *inter alia:* "The undersigned partnership hereby offers to purchase" the assets described in an accompanying exhibit, and "If the offer is accepted by you, the partnership shall have the right to assign its interest therein to" a Dealer Development corporation. Appendix at 170ex. The jury concluded from this evidence that the parties had entered a contract on December 18th, answering the following interrogatory in the affirmative:

> 16. Do you find that plaintiffs have shown by a preponderance of the evidence that, at the December 18, 1969 meeting at the offices of Wolf, Block, Schorr and Solis-Cohen, plaintiffs and defendant entered into a contract for the acquisition of Presidential Motors and its operation by plaintiffs as franchised Ford dealers which was contingent only upon approval of the deferred rent terms by Leaseco, which approval was communicated to plaintiffs on December 29, 1969?

Although we think the sufficiency of the evidence supporting this finding is suspect, and the existence of a contract at best tenuous, we approach the question from the same perspective as the district court: Assuming there to be a contract, is it enforceable?

The district court concluded that the nature of the alleged contract—involving a sale of goods for a purchase price of more than $500 and a lease in excess of three years in duration—subjected it to two provisions of Pennsylvania's Statute of Frauds. PA. STAT. ANN. tit. 12A, § 2-201 (1970); *ibid.*, tit. 68, §§ 250.201-250.203 (1965). On

appeal, Ford contends initially that the district court was correct. Alternatively, Ford urges that the alleged contract was one for the sale of a business which is a contract for the sale of "personal property", and that, in the absence of a signed written memorandum, the U.C.C. limits plaintiffs' recovery to $5,000. *Ibid.*, tit. 12A, § 1-206 (1970); *see Olympic Junior, Inc. v. David Crystal, Inc.*, 463 F.2d 1141, 1144-45 (3d Cir. 1972).

Whether the December 18th instrument was subject to the U.C.C. Statute of Frauds for the sale of goods, *see* n. 5 *supra*, as the trial court concluded, depends on whether the subject matter of the sale falls within the contemplation of "goods" as that term is defined in U.C.C. § 2-105, PA. STAT. ANN. tit. 12A, § 2-105 (1970).[7] Accordingly, our analysis begins with an examination of the documents involved in the December 18th transaction.

Accompanying the letter signed by plaintiffs were several exhibits, the principal one of which was entitled, "ASSETS TO BE SOLD AND COMPUTATION PRICE". The docu-

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7. Section 2-105 provides in part:

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).
>
> (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.
>
> (3) There may be a sale of a part interest in existing identified goods.

The official comment to the section amplifies as follows:

> 1. Subsection (1) on "goods": The phraseology of the prior uniform statutory provision has been changed so that:
>
> The definition of goods is based on the concept of movability and the term "chattels personal" is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.
>
> . . .
>
> The use of the word "fixtures" is avoided in view of the diversity of definitions of that term. This Article in including within its scope "things attached to realty" adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition becomes "goods" upon the making of the contract for sale.

ment listed: parts and accessories, miscellaneous inventories, work in process, equipment, leasehold improvements, service vehicles, new vehicles, demonstrators, used vehicles, daily rental vehicles, leased vehicles, notes receivables, vehicle receivables, parts and service receivables, contracts covering services, and used car warranties. The exhibit also established a formula for deferring rent on the premises owned by Ford's subsidiary, Leaseco, specifically set forth a method for computing the cost of inventories, and provided: "The purchase price to be paid by the Buyer for the assets to be sold shall be the aggregate sum determined in accordance with the computations and the inventories to be made as specified herein, less $65,000."[8] Appendix at 186ex.

The parties agree that Pennsylvania law governs the contract issue. Although no Pennsylvania cases under U.C.C. § 2-105 treat the transfer of the assets of an automobile dealership, the Pennsylvania courts had held that the prior Sales Act governed the sale of a whole business. *See, e.g., Siskin v. Cohen,* 363 Pa. 580, 582, 70 A.2d 293, 294-95 (1950). In addition, other jurisdictions have held that motor vehicles are "goods". *Park County Implement Co. v. Craig,* 397 P.2d 800, 802 (Wyo. 1964); *English v. Ford,* 17 Cal. App. 3d 1038, 1046, 95 Cal. Rptr. 501, 505 (1971).

For their part, plaintiffs claim an analogue in *Field v. Golden Triangle Broadcasting, Inc.,* 451 Pa. 410, 305 A.2d 689 (1973), *cert. denied,* 414 U.S. 1158 (1974). There, the Pennsylvania Supreme Court was concerned with an agreement for the sale of two radio stations, including FCC licenses and various physical assets. The seller sought to invoke those provisions of the U.C.C. which allow a seller to demand adequate assurance of performance and, in the absence thereof, to suspend his performance. U.C.C. § 2-609, PA. STAT. ANN. tit. 12A, § 2-609 (1970). The court

8. The Buyer was to receive the leasehold improvements valued at $35,000 at no additional charge. Appendix at 144ex, 173ex.

stated: "We do not believe that Article 2 of the UCC applies to the instant contract. Rather than being an agreement for the sale of 'goods', this is a contract for the sale of the businesses of two radio stations, including their tangible and intangible assets, as a going concern." 451 Pa. at 422, 305 A.2d at 696.

We believe that *Field* offers plaintiffs little comfort for two reasons. First, the above quoted statement is not a strong holding, but mere dictum, for the court ultimately found:

> [W]e have already indicated that the security which is provided for the entire contract is adequate. . . . Clearly, where adequate assurance of performance is already present, and there has been no change in circumstances to give rise to reasonable grounds for insecurity, a demand for additional security under section 2-609 is not justified.

Ibid. at 424, 305 A.2d at 696-97. Second, the factual complex in Field is distinct from that in the instant case. There, only $30,000 of the total purchase price of $650,000 —or 4.6 per cent—represented physical assets, including non-movables such as towers and fences. This is to be contrasted with the proposed sale of Presidential Motors in which, we agree with Ford's assessment, the value of movables to be sold was well in excess of three times the value of assets not properly classified as "goods".[9]

For the Statute of Frauds relating to the sale of goods to become applicable, we do not believe every asset subject

9. The purchase price for Presidential was accounted for entirely by inventory and equipment (i.e., "goods") with the single exception of certain receivables . . . These receivables had a net value of only $76,828 . . . . This amount for "non-goods" was much less than the value of the "goods" plaintiffs were purchasing. The net asset value of the inventory alone (excluding the new cars, trucks and demonstrator vehicles which would have been financed and thus not paid for by part of the purchase price) amounted to $254,189 . . . . To this should be added the net asset value of the equipment plaintiffs offered to purchase which cannot be calculated precisely from Exhibit D-108 because the equipment value stated there included diagnostic equipment which plaintiffs were not purchasing . . . . Ford's reply brief at 31 n.36 (record references omitted).

to the sale must qualify under the "movable" test of U.C.C. § 2-105. *See* n.7 *supra*. Rather than a view of mechanical technicality or of mathematical nicety, a view of the reasonable totality of the circumstances should control the characterization of the contract for sale. If, viewed as a whole, it can be concluded that the essential bulk of the assets to be transferred qualify as "goods", then it is appropriate to consider the transaction a "contract for the sale of goods". To insist that all assets qualify as "goods" would substantially thwart the intentions of the drafters of the Uniform Commercial Code; it would sanction the absurd. The agreement of sale and purchase could cover physical, movable assets, thus qualifying as "goods", as well as other assets—such as receivables from their particular lines—not so qualifying. But to segregate "goods" assets from "non-goods" assets, and to insist that the Statute of Frauds apply only to a portion of the contract, would be to make the contract divisible and impossible of performance within the intention of the parties.

We believe it preferable to utilize a rule of reasonable characterization of the transaction as a whole. Applying this rule to the facts before us and carefully examining the list of assets to be sold, we note that title to no real estate was to pass in the transaction, nor was any value assigned for good will or the value of the business as a going concern. Accordingly, we have no hesitation in agreeing with the district court's applying U.C.C. § 2-201 and its finding that the alleged contract was unenforceable for want of the signature of Ford Motor Company.[10]

VI.

Finally, we reject cross-appellants' argument for a new trial limited to damages for the violation of the Dealers' Day in Court Act. We are persuaded that the question of damages was properly presented to and fully addressed by the jury.

10. Because of the view we take, it is unnecessary to reach the applicability of U.C.C. § 1-206 or of the Statute of Frauds relating to leases of more than three years in duration.

This issue is controlled by the interrogatory submitted to the jury:

> 12. What figure, if any, do you find accurately represents the value of plaintiffs' interest in Chestnut Motors on the date plaintiffs were terminated as dealers?
>
> A. None.

Plaintiffs had become Ford dealers at Chestnut Motors, Inc., in West Philadelphia early in 1969 under a "Dealer Development" arrangement in which they put up twenty per cent (20%), or $60,200, and Ford put up eighty per cent (80%) of the investment required to purchase the dealership from the previous dealer. Under the plan, plaintiffs were to buy out Ford's interest with dealership profits, if any. Fire destroyed part of the Chestnut Street facilities, which were leased from the previous dealer, only eight and one-half months after plaintiffs entered the venture. During the negotiations for the purchase of Presidential Motors subsequent to the fire, the parties agreed that plaintiffs would be credited with their interest in Chestnut "valued as of the date of the fire (and undiminished by losses suffered in the subsequent distress operations)." Appellant's Brief at 4; *see* n.2 *supra*. The figure assigned to this value, however, is not controlling on the instant question for two reasons. First, it was an item for negotiations preliminary to contract. Second, and more importantly, any damages to which plaintiffs might have been entitled under the Dealers' Day in Court Act would have to be assessed as of the date of the wrongful termination—April 9, 1970.

Trial testimony revealed that the Chestnut Street operation was officially closed down as of March 1, 1970. *E.g.*, Appendix at 371a. Also in evidence and available

for the jury's consideration was a certified public accountant's revised and corrected Statement of Income (Loss) for Chestnut Motors during the four-month period ending April 30, 1970. This document showed net sales of $403,873 and a cost of sales of $421,468—or a gross sales loss of $17,595. Added to this were selling, general and administrative expenses of $172,125, or a total loss from operations of $189,720. Other expenses amounted to $3,236, resulting in a net loss for the period of $192,956. Appendix at 341ex. From this information, the jury could well have found that, by the time Ford terminated plaintiffs' franchise at Chestnut Motors on April 9, 1970, post-fire losses had reduced the value of plaintiffs' interest in the operation to zero. Under these circumstances, we cannot disturb the jury's determination that plaintiffs should recover no damages under the Dealers' Day in Court Act.[11]

VII.

We have considered carefully all other contentions of the cross-appellants and find them devoid of merit.

The judgment of the district court will be reversed with a direction to enter judgment in favor of appellant Ford Motor Company.

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11. The jury, by its answers to Interrogatory Nos. 7 and 11, found that Ford had not acted in good faith in terminating the Chestnut Motors dealership. Notwithstanding however, the jury found that plaintiffs suffered no damages. The district court thereupon properly molded the verdict to enter judgment for Ford. This judgment is consistent with the jury's responses. F.R. Civ. P. 49(a); *see Halprin v. Mora*, 231 F.2d 197 (3d Cir. 1956); *Voelkel v. Bennet*, 31 F. Supp. 506, 510 (E.D. Pa.), *aff'd*, 115 F.2d 102 (3d Cir. 1940).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1877 and 74-1878

ARMEN DE FILIPPO and SHELDON FLEISHMAN t/a
A & S, a Partnership

vs.

FORD MOTOR COMPANY, a Delaware Corporation
PRESIDENTIAL FORD, INC., a Delaware Corporation
FORD LEASING DEVELOPMENT CO.,
a Delaware Corporation
Ford Motor Company, Appellant in *No. 74-1877*

Armen De Filippo and Sheldon Fleishman t/a
A & S, a Partnership, Appellants in *No. 74-1878*

(D. C. Civil Action No. 70-1003)

On Appeal From The United States District Court
For The Eastern District of Pennsylvania

Present: ALDISERT, GIBBONS and GARTH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court against Ford Motor Company on the §1 Sherman Act claim filed November 20, 1973 and the order of June 14, 1974, insofar, as it awards counsel fees, be, and the same are hereby reversed, and the cause is remanded to the said District Court with a direction to enter judgment in

favor of appellant Ford Motor Company. Costs taxed against appellees in No. 74-1877 and against appellants in No. 74-1878.

ATTEST:

May 8, 1975

Clerk

Appendix B—Order of the United States Court of Appeals for the Third Circuit Denying Rehearing In Banc, Filed June 10, 1975

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1877

ARMEN DE FILIPPO, *et al.*,

v.

FORD MOTOR CO., etc., *et al.*,
FORD MOTOR CO., *Appellant*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, GIBBONS, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by

Appellees

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ Aldisert
Judge

Dated: June 10, 1975

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*Judges Adams and Rosenn did not participate in the consideration of this matter.

Appendix C—Opinion of the United States District Court for the Eastern District of Pennsylvania Filed June 14, 1974

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARMEN DE FILIPPO
and
SHELDON FLEISHMAN
t/a A & S a Partnership — Civil Action

v. — No. 70-1003

FORD MOTOR COMPANY,
a Delaware Corporation
PRESIDENTIAL FORD, INC.,
a Delaware Corporation
FORD LEASING DEVELOPMENT
COMPANY, a Delaware Corporation

Memorandum and Order

Newcomer, J. — June 14, 1974

The present case was tried to a jury on four causes of action, all arising from the same basic set of operative facts, between October 1 and November 13, 1973. On November 15, 1973, the jury returned a verdict in favor of plaintiffs on their Sherman anti-trust[1] claim and on their contract claim; the jury found for plaintiffs on their Automobile Dealer's Day in Court Act[2] claim, but also found that plaintiffs suffered no damages because of defendant's violation. Accordingly, the Court entered judgment for defendant on this claim, as well as on the contract claim,[3]

1. 15 U.S.C.A. §1 *et seq.*
2. 15 U.S.C.A. §1221-1225.
3. Although the Court described this judgment as a judgment non obstante verdicto at trial, it would be more correct to categorize the Court's action as "molding . . . the verdict as a matter of law . . . ," *Millard v. Municipal Sewer Authority*, 442 F. 2d 539, 542 (3rd Cir. 1971), since the jury was not instructed as to the Statute of Frauds and thus could not be said to have applied all the law to the facts. *See* 5A Moore's Federal Practice ¶49.02 (2d ed.) at 2206: "The procedure [special interrogatories] leaves to the trial judge the responsibility of applying appropriate legal principles to the facts found by the jury and the jury need not be instructed concerning the legal principles which the judge will apply to the facts found by them."

since the jury's answers to the special interrogatories revealed that the Statute of Frauds would bar any contractual recovery.[4] The Court entered judgment in favor of plaintiffs on the anti-trust claim, and trebled the damages awarded by the jury, which were $750,000, to $2,250,000.

Both parties have moved under Rules 50 and 59 of the Federal Rules of Civil Procedure for the grant of judgment n.o.v. or a new trial as to the various judgments entered. Defendant asserts that the plaintiffs' verdict on the anti-trust claim was based on insufficient evidence and was contrary to law, justifying the entry of judgment n.o.v. It also asserts that this Court committed a series of errors in admitting evidence before the jury or in instructing the jury, justifying a new trial. Plaintiffs attack the Court's charge and interrogatories to the jury on the anti-trust claim while supporting the jury's verdict. Plaintiffs move to amend the entry of judgment in favor of defendant on the contract claim, so as to allow recovery on this claim, and they also move for a new trial on their Dealer's Day in Court Act claim. Before addressing the arguments in support of and in opposition to these motions, it would be wise to sketch the facts from which these claims, and the jury's decisions on them, arose.

4. The Court had already directed a verdict in favor of defendant as to plaintiffs' fourth cause of action, which was based on an alleged obligation by Ford to return to plaintiffs the value of their equity in Chestnut Motors. The Court had also, upon the completion of defendant's case, directed verdicts in favor of Presidential Ford, Inc. and Ford Leasing Development Company on all four of plaintiff's causes of action.

Factual Background

Plaintiffs in this case, Armen De Filippo and Sheldon Fleishman, became Ford dealers at Chestnut Motors in West Philadelphia under an arrangement known as a "Dealer Development Dealership," in which plaintiffs put up 20% of the capital, Ford put up the rest, and plaintiffs were obligated to buy out Ford's share with the dealership's profit over a specified period of time. The record shows that plaintiffs succeeded in ending Chestnut Motor's history of losses, although because of an accountant's error, plaintiffs' profit margin was not as great as was originally thought.

On October 15, 1969, approximately eight months after plaintiffs began managing the dealership, Chestnut's main showroom, service department, parts department, and general offices were destroyed by fire.

During the negotiations between plaintiffs and Ford that followed the fire over the possibility of plaintiffs acquiring another Ford dealership, the parties focused on Presidential Motors, a "factory" (Ford owned and operated) dealership located on the fringe of Philadelphia which had shown consistent losses. The sale of Presidential to plaintiffs as private dealers was attractive to Ford because it had received complaints from nearby private Ford dealers that Presidential's subsidized losses were detracting from their sales. However, it appeared that even the dealer development program would not present attractive enough terms to induce plaintiffs to take over Presidential. Consequently, plaintiffs and Ford representatives worked out an arrangement whereby plaintiffs would postpone their investment until they had operated Presidential (and, hopefully, brought it into the black) for three months and would defer substantial parts of their rent payments to Ford until the last years of their lease.

During the negotiations these terms were embodied in the form of a buy-sell agreement, but between the conclusion of these negotiations on December 12, 1969, and the

plaintiffs' meeting with Ford Representatives on December 18, 1969, at which plaintiffs testified they expected the Presidential contract to be concluded, Ford officials changed the form of agreed terms from a buy-sell agreement into a proposed offer by plaintiffs to purchase Presidential assets. This change was ordered by Mr. Dewitt, Supervisor of Ford's Dealer Investment Services, and was effected by tearing off the first page of the buy-sell agreement and substituting a letter delineated an "offer to purchase," to which the remaining pages of the buy-sell agreement were attached as an appendix. Plaintiffs were not informed of this change.

At the December 18, 1969 meeting, Ford representatives indicated to De Filippo[4] that the deferred rent part of the negotiated package would have to await approval by Leaseco, Ford's subsidiary in charge of leasing operations. De Filippo became angry and threatened to back out on the whole deal, whereupon George Brandtz, Esquire of the law firm of Wolf, Block, Schorr, and Solis-Cohen, in whose offices the December 18th meeting was being held, suggested that the offer to purchase Presidential's assets (which De Filippo but not defendant had signed) be held in escrow pending Leaseco's approval of the deferred rent terms. This suggestion was accepted by both parties.

Plaintiff De Filippo testified at trial that he was not told of the change from a buy-sell agreement to an offer, and that he was led to believe by Ford representatives, some of whom he had relied upon in the past in his business affairs, that a complete agreement had been entered into between himself and Ford, contingent only upon Leasco's approval. He also testified that he thought Mr. Brandtz was representing both himself and Ford, since Wolf, Block, Schorr and Solis-Cohen had acted as attorney for Chestnut Motors in the past. Mr. Brandtz testified that he was acting solely for Ford, the seller, and Chestnut Motors, the buyer, of which plaintiff was only a minority stockholder. It was

4. At this time Fleishman was attending his sick wife, and De Filippo was handling affairs for both men.

undisputed, however, that Mr. Brandtz did not tell De Filippo that he was not representing him.

The time fixed at the December 18th meeting for plaintiffs' becoming managers at Presidential was January 5, 1970. Between December 18th and January 5th, Ford received complaints from several Philadelphia-area Ford dealers about the "special terms," namely, the postponed investment and deferred rent contained in the proposed arrangement between plaintiffs and Ford.[5]

On December 29, 1969, Leaseco approved plaintiffs' deferred rent terms. Plaintiffs prepared to move into Presidential on January 5, 1970, but were held off at the last minute by Ford management personnel. On January 9, 1970, Mr. Naughton, a Vice-President of Ford and General Manager of its Ford Division, flew from Detroit to Philadelphia to attend a meeting of the Philadelphia-area Ford dealers. At that meeting, which neither plaintiff attended, Naughton assured the dealers that the sale of Presidential would not be made to plaintiffs on the terms discussed above.

Subsequent to this meeting, Ford offered plaintiffs Presidential without these terms, but plaintiffs refused. Plaintiffs and Ford also negotiated over the acquisition of a third Philadelphia-area dealership, Circle Ford, but these negotiations proved fruitless. On April 10, 1970, Ford terminated plaintiffs' franchise at Chestnut Motors. There was evidence that this termination was the result of plaintiffs' refusal to sign a waiver of any legal claims they might have arising out of the aborted Presidential transaction.

The Verdicts

Plaintiffs sued Ford (and a number of its subsidiaries) under the Sherman-Act, 15 U.S.C.A. §1, alleging that Ford had conspired with its dealers to prevent plaintiffs from becoming dealers at Presidential; under the Automobile Dealer's Day in Court Act, 15 U.S.C.A. §1221-1225, alleging that in threatening to terminate unless plaintiffs signed a

5. The sale was actually to be made by Presidential Motors, Inc. to Chestnut Motors, Inc.

general waiver, defendant acted in bad faith; and upon a contract theory, alleging that an oral contract between plaintiffs and Ford could have come into existence on three separate occasions between December 18, 1969, and January 5, 1970, and that Ford's refusal to permit plaintiffs to enter into the operation of Presidential constituted a breach of such contract. Plaintiffs also claimed that a return of their equity in Chestnut Motors as of the date of the fire was due them. However, the Court, reasoning that defendant could only have been obligated to pay plaintiffs the October 15th value of their equity as part of a contract with plaintiffs for the sale of Presidential, and that any equity return would be subsumed in the damages for the breach of any such contract, directed a verdict in favor of defendant on the return of equity claim at the close of the evidence.

The jury found that Ford's failure to deal with plaintiffs on the terms outlined in the document which plaintiffs signed on December 18, 1969, was the result of a conspiracy between Ford and its Philadelphia-area dealers. The jury found that this conspiracy was not motivated by purpose of totally preventing plaintiffs from becoming Ford dealers in the Philadelphia area, but that it did constitute an unreasonable restraint of trade.

The jury found that a contract for the sale of Presidential Motors had been entered into between plaintiffs and Ford on December 18, 1969 (contingent only upon Leaseco's approval of the deferred rent terms). However, since the jury found that Ford's representatives at the December 18th meeting did not intentionally fail to disclose the fact that the document plaintiffs were signing had been changed into an offer, the Court decided that there was no reason why the statute of Frauds should not be applied, and judgment for defendant was entered on the contract claim.[6]

6. The Court had submitted the question of intentional failure to disclose to the jury on the theory that the Court should not allow the Statute of Frauds to be used in defense of a fraud. *See* Simplex Precase Industries, Inc. v. Biehl, 395 Pa. 105 (1959).

As to plaintiffs' Dealer's Day in Court Act claim, the jury found that defendant violated that Act both in threatening to terminate and in terminating the Chestnut franchise because plaintiffs would not sign a general release. However, the jury also found that the Chestnut franchise had no value as of the date it was terminated. Consequently, the Court entered judgment in favor of defendant on this claim as well.

We will deal with plaintiffs' and defendant's motions on a claim-by-claim basis.

The Anti-trust Claim

I. *Defendant's Motion for Judgment N.O.V.*

Defendant moves for the entry of judgment n.o.v. on plaintiffs' anti-trust claim, claiming that the jury's finding that the agreement between defendant and the Ford dealers was not the expression of a purpose to totally exclude plaintiffs from any and all Philadelphia-area Ford dealerships precludes that agreement from being considered a *per se* violation of the Sherman Act. As to the jury's finding that this agreement constituted an unreasonable restraint of trade, defendant argues that there was insufficient evidence presented at trial to support such a finding. Finally, defendant requests judgment n.o.v. on the grounds that the agreement found by the jury in interrogatory No. 1 was reasonable as a matter of law.

We are persuaded upon an examination of the standards for determining the reasonability of a restraint that there was insufficient evidence to warrant the jury's finding that the agreement in question constituted an unreasonable restraint of trade.

Defendant has cited several cases[7] in support of the proposition that proof of an unreasonable restraint requires

7. The three cases among those cited by defendant in which the Supreme Court actually applied the rule of reason test were *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Times-Picayune Publishing Co. v. United States*, 346 U.S. 594 (1952); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

extensive statistical evidence as to the kinds of goods or services with which the product subject to the restraint effectively competes, the geographic market in which it effectively competes, the percentage of the market affected by the alleged restraint, the size and strength of the competition, the existence or non-existence of barriers to entry and the effect of the practice thereon, the purpose behind the alleged restraint, and the effect of the restraint on price or availability of products.

Except on the matter of the purpose behind the restraint, plaintiffs herein offered little or no evidence as to any of the above elements of a rule of reason violation. No evidence was presented as to the effect of the restraint on interbrand competition (among dealers), which is required by the *United States v. Arnold, Schwinn*[8] case. No evidence was presented on the percentage of the relevant market[9] affected by the alleged restraint, the existence of barriers to entry and the effect of the practice thereon, or the effect of the restraint on the price or the availability of the affected product.

As plaintiffs' counsel declared to the Court immediately before the Court's deliverance of its charge:

> "Plaintiffs offered no evidence whatsoever during the trial that the particular conspiracy involved in this case did constitute an unreasonable restraint of trade."
>
> ". . . We did not try to prove as a matter of fact unreasonable restraint of trade because as the cases which we have cited and quoted say, to prove unreasonable restraint of trade would require just an incredible amount of evidence. It would have taken us maybe weeks or months, and this is right in the quote that I submitted to Your Honor.

8. 388 U.S. 365 (1967).

9. There was testimony from other Ford dealers and plaintiffs which would support a finding that the relevant geographic market was the "Philadelphia area" or "Greater Philadelphia area," and it was so defined in the Court's charge.

That is the reason why in per se violations such as group boycotts you do not have to prove it. So you put us in a position where you are submitting an issue of fact to the jury which we didn't try to prove. We have to lose on that because we never tried to prove it because it is not an issue of fact, sir, it is an issue of law."

At the time of these statements we believed that plaintiffs' counsel was exaggerating his predicament in order to persuade the Court to submit his case to the jury as a group boycott case. However, after examining the parties' briefs and the transcripts, the Court is persuaded that plaintiffs' counsel was candidly stating his failure (indeed lack of attempt) to prove a rule of reason violation.

If we were to agree with defendant that the jury's answer to interrogatory No. 2 defeated *per se* liability, our finding that there was insufficient evidence to support the jury's finding of unreasonableness would compel us to enter judgment in defendant's favor. However, we do not agree with defendant for the reasons discussed below.

When this Court originally submitted the special interrogatories on the anti-trust claim to the jury, we were of the opinion that Ford could not be held liable on the basis of a finding of conspiracy alone. This was because Ford's refusal to deal with plaintiffs, even if it was the result of an agreement between Ford and its Philadelphia-area dealers, did not resemble those kinds of situations which the courts had found to be "naked restraints of trade" and thus illegal without need of further inquiry into their effects on competition. *United States v. General Motors Corp.*, 384 U.S. 147 (1966); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). This was because Ford refused to deal with plaintiffs on terms which we then believed to be more favorable than those offered by Ford to its other dealers, whether prospective or incumbent. Since the *per se* group boycott cases had dealt with agreements to refuse to deal with a plaintiff at all or only upon *less* favorable terms than those

offered to others, it was felt that the instant situation could not be considered to come within the *per se* group boycott category.

The Court was led to this conclusion by the reasoning as well as the facts of the group boycott cases. The pernicious effects which the Supreme Court inferred from the inherent nature of a group boycott were best set out in the Court's decision in *Klor's:*

> "This [group boycott] takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendant's products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale and in some instances forbids them from selling to it on any terms whatsoever." 359 U.S. at 213.

The present agreement did not appear to take from plaintiffs their access to Ford dealerships in an "open competitive market;" it merely prevented plaintiffs from acquiring a dealership on special terms. Nor did the present agreement seem to deprive Ford of its freedom to sell to plaintiffs "at the same prices and conditions made available to [its other dealers]." 359 U.S. at 213.

An additional factor that led to the conclusion that the present situation did not resemble the situations condemned by the group boycott *per se* cases was plaintiffs' exclusion from only one source of supply of defendant's product. It was the Court's understanding that the group boycott cases had involved either exclusion from a market or denial of access to a line of merchandise. In *Klor's*, cited *supra*, plaintiffs were denied access (or allowed access on discriminatory terms only) to the appliances sold by the manufacturer-members of the conspiracy; in *General Motors*, cited *supra*, plaintiffs were prevented from selling to discounters entirely (and the discounters were denied access to General Motors cars); in *Fashion Originators'*

Guild v. Federal Trade Commission, 312 U.S. 457 (1941), certain retailers were totally denied access to the products of Guild members. The agreement between Ford and its dealers not to deal with plaintiffs on the negotiated terms denied plaintiffs access to only a portion of defendant's product.[10] Absent a finding that the agreement was motivated by a desire to deny plaintiffs access to defendant's entire product, rather than merely one outlet, it was felt that plaintiffs had not been the victims of the kind of restraint condemned without further inquiry by the group boycott cases.

Throughout trial, defendant maintained that a finding of agreement not to deal with plaintiffs did not constitute a *per se* violation unless the jury also found that this agreement had been motivated by a purpose to exclude plaintiffs from becoming Philadelphia-area Ford dealers on any terms. Whether plaintiffs had been offered more or less favorable terms than those offered to other dealers, or whether plaintiffs had been excluded from access to a fraction or all of defendant's product, is irrelevant to this argument. Defendant contends that even an agreement to deal with plaintiffs on only discriminatory terms would not qualify as a *per se* violation unless a purpose to exclude plaintiffs from the market was also found. Defendant bases this argument on the case of *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1959), *cert. denied* 396 U.S. 1062 (1970), which in dictum declared that in all the Supreme Court group boycott cases ". . . There was a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." 416 F.2d at 76.

This Court believes that defendant too narrowly construes *Seagram* when it states that that case requires a finding of purpose to exclude rather than an "anti-competitive purpose" in general. Nevertheless, assuming arguendo

10. This is true whether the relevant product is seen as wholesale Ford vehicles or Philadelphia-area Ford dealerships.

that defendant's construction is correct, the Court rejected it before trial and continues to reject it now.

It is this Court's belief that an "anti-competitive purpose" as stated by the *Seagram* case can generally be presumed in a situation where there is a concerted refusal to deal with a party on any terms or only on unfavorable terms, and that no specific finding of anti-competitive purpose, let alone a purpose to entirely exclude from the market, need be made. While there are special situations in which this presumption cannot be made, such as the situation faced in *Seagram* or by the Third Circuit in *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093 (1972), we do not feel that the present situation is one of them.[11] Plaintiffs were not exclusive distributors facing replacement by another exclusive distributor. The Court is aware that this Circuit has commented favorably on the reasoning of the *Seagram* case, *Ark Dental*, cited *supra*, but we believe that this was done only insofar as it applied to the exclusive distributor situation. Should we be wrong, the jury's answer to the second interrogatory would allow the appellate court to correct our error without the need of a new trial.

This Court did submit to the jury the question of whether the agreement, if any, was motivated by a purpose to exclude plaintiffs from the market (interrogatory No. 2). But this interrogatory was submitted not on the theory that it was prerequisite to a finding of *per se* liability but that it

11. In both *Seagram* and *Ark Dental*, the Court was faced with an agreement between manufacturers to replace one joint exclusive distributor with another. The losing distributor sued, alleging a group boycott between both manufacturers and the triumphant distributor. The Third Circuit stated:

> "It is indisputable that a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed prior to the seller's termination of A." (461 F. 2d at 1094)

was an alternative basis for such a finding. A concerted refusal to deal, whether or not it fits the outlines of a group boycott as defined by the group boycott cases (see discussion in pp. 9-10, supra), would undeniably be a *per se* restraint were it found to be the expression of a purpose to totally exclude a competitor[12] from the market.

Thus, the jury's answer to the second interrogatory does not preclude a finding that the agreement between Ford and its Philadelphia-area dealers constituted a *per se* violation of the Sherman Act. Upon a re-examination of the record and with the benefit of able and extensive briefing and oral argument of counsel for both parties, the Court has concluded that the facts of this case bring it within the group boycott *per se* liability category.

As noted above, it was originally thought that the terms offered plaintiffs for the purchase and operation of Presidential were not offered to other neighboring Ford dealers. However, there was testimony that these terms, or substantially equal terms, were offered to the other dealers. The record reveals that on December 30, 1969, a meeting was held between Ford's regional representatives and certain Philadelphia-area Ford dealers for the purpose of discussing the terms of the proposed sale of Presidential to plaintiffs. A number of these dealers left this meeting with suspicions that plaintiffs were receiving preferential treatment.

One of the dealers who had attended the December 30 meeting, Kerry Pacifico, subsequently contacted Ford's Dealer Policy Board, the bureau officially responsible for dealer-corporation relations, to protest the terms of the proposed sale. There was evidence that this dealer threatened to bring suit, presumably under the Robinson-Patman Act,[13] because of Ford's allegedly preferential treatment

12. Although plaintiffs competed with the other dealers and not Ford, the latter can be held solely liable for the bad purposes of its co-conspirators. E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F. 2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

13. 15 U.S.C. §13 (1936).

of plaintiffs. On January 6, 1970, the members of the Dealer Policy Board travelled from Michigan to Philadelphia to meet with this dealer. Unable to mollify him, they instructed Ford's management for the Philadelphia region that terms similar to those being offered plaintiffs would have to be offered to the other dealers in the Philadelphia-area in order to protect Ford from a Robinson-Patman suit. These instructions were based upon advice given to the Policy Board members by Ford's legal counsel, and were apparently ratified by the officer in charge of the Ford Division of the Ford Motor Company, John Naughton. (N.T. p. 3984, 3986).

On January 7, 1970, certain Philadelphia Ford management personnel met with Mr. Pacifico. At this meeting they informed this dealer that they would extend him rent terms identical to those being proposed to plaintiffs even though it meant that Ford would have to buy Pacifico's land and become his landlord in order to put these terms into effect. These Ford officials indicated that such an arrangement would also be offered to all the neighboring Ford dealers. The dealer, expressing a clear lack of enthusiasm for taking Ford on as a landlord, rejected this offer, and remained constant in his criticism of the "special terms" being offered plaintiffs. The following testimony was elicited from the Ford representative who conducted this meeting:

> "Q. O.K. Well, this problem that you considered the most important one, the one about the deferred rent that if you offered it to Armen and Shelley [DeFilippo and Fleishman] you'd have to offer it to everybody?
>
> A. Yes.
>
> Q. Well, you kind of already had gone partway on that in your January 7th meeting with Mr. Pacifico. You'd already told him that if the deal went through with Armen and Shelley he could have the same deal and you'd buy his place?
>
> A. Yes.

Q. So why was that still a problem? In fact, that decision had been made to tell the dealers, hadn't it, because you told one of them?

A. Well, that was the next day after the Policy Board told me and Mr. Barclay and Mr. Curran, I believe—Mr. Barclay confirmed that I had to tell them.

Q. All right. Then, in fact, by January 9th, he already had told you, so you kind of crossed the Rubicon?

A. I told one dealer. I made one contract. I had 29 more to make.

Q. Right, but that one dealer was Kerry Pacifico who was pretty much the acknowledged leader, and I think you realized, didn't you, if you told Kerry he was going to tell all the other dealers?

A. Yes." (N.T. pp. 3991-3992).

On January 9, 1970, during a meeting at which most of the Philadelphia-area dealers were present, John Naughton announced that Ford would not go through with the proposed deal with plaintiffs. But even after this announcement was made, Ford personnel extended terms similar to those offered plaintiffs and Pacifico to other Ford dealers (N.T. pp. 2604-2605).

It is true that one of the "concessions" offered plaintiffs was permission to defer their investment in Presidential until they had operated it for three months, and that this feature was never offered to the other dealers. But it does not appear that such a proposal could have been offered to dealers who had already made their investments. In offering to buy the dealers' land and rent it back to them on a deferred basis, Ford had gone a long way towards equalizing its treatment of plaintiffs and its treatment of the other dealers. And while it is also true that these terms may have been offered to the other dealers subject to Ford management's ultimate approval of the terms offered to plaintiffs, this qualification becomes irrelevant when it is remembered that the terms offered plaintiffs were also subject to ultimate approval by Ford's management. An agreement to refuse to deal with a party on equal terms with other customers is not less than a *per se* violation merely because those terms are proposed rather than the subject of a binding contract.

As for the assumption that a plaintiff must either be excluded from a market or completely denied access to defendant's product by an agreement before that agreement rises to the level of a *per se* violation, plaintiffs' counsel have advanced several decisions which support the conclusion that less than total exclusion or denial of access is required. *Ricci v. Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir.), *aff'd.* 409 U.S. 289 (1973); *Ford Motor Co. v. Webster's Auto Sales*, 361 F.2d 874 (1st Cir. 1966).

In *Ricci*, the Seventh Circuit held that a commodities broker had been the victim of a group boycott when the president and certain members of the Chicago Mercantile Exchange agreed to remove plaintiff's Exchange membership in violation of Exchange by-laws. The Court ruled that the facts alleged in plaintiff's complaint made out a *per se* violation even though plaintiff obtained another membership three weeks later. However, the Circuit Court stayed the anti-trust action pending administrative proceedings under the primary jurisdiction doctrine. The Supreme Court affirmed the lower court's finding that primary jurisdiction lay with the administrative agency.

In *Ford Motor Co. v. Webster's Auto Sales*, cited *supra*, plaintiff was a used car dealer who had succeeded in acquiring "factory Fords" (vehicles made available to Ford employees for their own use) from Ford dealers on a wholesale basis. A Ford dealer complained about this practice to Ford and Ford attempted to stop its dealers from reselling factory Fords to plaintiff (at least at wholesale). The District Court found a *per se* group boycott and the Circuit affirmed, even though plaintiff had only been denied access to a portion of defendant's product.

Based on these decisions, the Court believes that a *per se* violation of the Sherman Act can be made out by an

agreement which denies access to only one source of supply of defendant's product.

Defendant asserts in support of its motion for judgment n.o.v. that the agreement to refuse to deal with the plaintiffs at Presidential on the terms set forth in plaintiffs' offer was reasonable as a matter of law. Defendant cites a number of instances in which courts have held that an agreement between a manufacturer and a distributor to shift the manufacturer's exclusive distributorship to that dealer from another dealer was not an unreasonable restraint of trade. The present case does not involve an exclusive dealership,[14] however, and none of the cases referred to by defendant involve, as does the present case, a situation in which a group of plaintiffs' competitors combine with a manufacturer to interfere with plaintiffs' attempt to secure a distributorship.

II. *Defendant's Motion for a New Trial*

Defendant has moved for a new trial on the basis of several alleged errors by the Court. We will deal with these seriatim.

a. Defendant's first three asserted bases for a new trial.

Defendant's claims that it was prejudiced because plaintiffs' pretrial memorandum did not mention a rule of reason theory of liability, that the Court's charge on reasonableness was erroneous and that the Court's third interrogatory was erroneous, are no longer relevant since the Court has ruled that no rule of reason violation has been proven. Therefore, we will proceed to discuss defendant's new trial motions that concern damage evidence.

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14. The replacement of one exclusive distributor by another necessarily involves the total exclusion of a competitor from the affected product's market.

b. Errors concerning Admissions of Plaintiffs' Expert's Testimony concerning the value or plaintiffs' interest in Presidential.

i. No basis in record for assumption that Presidential would show $84,000 profit in first year (after its sale).

Defendant attacks the figure of $84,000, which plaintiffs' two experts relied upon in computing damages, as having no basis in the record establishing it as Presidential's first year's profits under new management. The $84,000 figure was taken from a profit forecast prepared by Ford to be shown to potential buyers of Presidential. (The forecast was prepared on August 18, 1970, almost nine months after the agreement not to deal with plaintiffs). Defendant points out that this document predicts a first-year profit of $19,555 and a "going year" profit of $84,447, and that it was based on factors which did not conform to the arrangement plaintiffs had offered.

In spite of defendant's arguments, the Court feels now as it did at trial that this forecast provided a reasonable basis for plaintiffs' use of the $84,000 figure. Defendant had the opportunity to, and did, argue to the jury the factors underlying the profit forecast which were not reflected in plaintiffs' proposed arrangement for operating Presidential. Defendant also presented testimony by a Ford officer, Mr. Curran, which, based on an adjustment of the forecast to fit plaintiffs' theoretical operating situation, revealed a much lower profit prediction.

ii. Plaintiffs' experts' projections.

Defendant objects to the admission of the testimony of plaintiffs' expert Professor Adams, who projected an increase in Presidential's profits of 7% over a twenty-year period, based on Adams' predictions that national income would increase 7% (6% in the Philadelphia area) and national consumer purchases of automobiles and parts would increase 7% over the same twenty-year period.

namely, 1970-1990. Defendant attacks these projections on two levels, the first being that Adam's projections of the 6% and 7% increases lacked the foundation required by the Third Circuit in *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (1973), and the second being that, assuming these increases to be valid, there was no basis in the record for assuming, as Professor Adams did, that any increase in Presidential's profits would exactly mirror either of these increases.

Defendant's first challenge—that Adams' projections for future national income and automobile purchases was inadmissible speculation—construes too narrowly the *Hoffman* test for the admissibility of evidence concerning future trends. In *Hoffman*, the Third Circuit ordered a new trial on the amount of compensatory damages because plaintiff was allowed to introduce a loss-of-wages projection calculated on the assumption that wages would continue to increase at the same rate that they had during the proceeding five years. The Court, noting that the case was ". . . marked by the total absence of any evidence of probable future salary or economic trends", treated the assumption that the rate of inflation would remain constant as "speculation." In the present case, however, Professor Adams offered statistics concerning the past rate of growth of factors which would probably influence the future rate of growth of car purchases, as well as his opinion as to why these factors would continue into the future. These statistics provide the foundation for allowing Professor Adams to testify as to the 6% and 7% figures. The jury heard defendant cross-examine Adams on the probability that these projections would actually be realized including inquiries as to the impact of the fuel crisis and anti-pollution regulations on future Ford automobile purchases. It was for the jury, and not the Court, to decide whether it was probable that these projected increases were accurate; the *Hoffman* case only requires the Court to find that there is a reasonable basis for thinking that such increases are probable,

and this Court was satisfied that Adams' testimony established such a reasonable basis.

As to defendant's challenge to Adams' link between these projected increases and the rate of increase of Presidential's profits, the Court was also satisfied that a reasonable basis was established by Adams' testimony for assuming a one-to-one relationship. Defendant was given ample opportunity to cross-examine Adams on the probability the relationship of national income and sales increases to the profit margins of Philadelphia-area dealers and, in particular, of Presidential Motors.

d. Remaining Grounds.

The Court believes that it can summarily deal with the other grounds which defendant offers in support of its motion for a new trial. There was a reasonable basis in the record for permitting plaintiffs' experts to make their projections over a twenty-year period, and in permitting Professor Mendelson to include plaintiffs' bonus[15] in his valuation of plaintiffs' interest in Presidential Motors. Defendant was able to cross-examine plaintiffs' experts and other witnesses, as well as offering its own testimony, on the accuracy of these two assumptions.

Defendant charges that Professor Mendelson's evaluation of plaintiffs' interest in Presidential should have been excluded because he employed an improper discounting procedure. Professor Mendelson used a 6% simple interest figure in discounting the profits that Presidential Motors might have made to their present worth in valuing the value of plaintiffs' interest in 1970. Defendant raised this objection during trial at which time the Court ruled that plaintiffs would be permitted to use the 6% simple in-

15. Defendant attacks Mendelson's inclusion of bonus in the value plaintiffs' interest on the grounds that it represented compensation rather than profits. But the definition of bonus as profits was taken from the Dealer Development contract prepared by defendant for plaintiffs' signature.

terest figure, but that defendants could cross-examine or offer counter-projections on a percentage figure which they felt more closely approximated the risk factor for the automobile industry. This Court's decision was based upon authority cited to it by defendant which stated that

> ". . . The discount rate applied should vary according to the amount of evidence *the trier of fact* has in the likelihood that the earnings level he has predicted actually would have been maintained. . . ." Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harvard L. Rev. 1566, 1577 (1967).

While permitting plaintiffs to rely on the percentage figure, the Court did not remove the ultimate decision as to the reasonableness of the discount figure from the jury, and thus did not commit error requiring a new trial.

The Court also rejects defendant's assertions that its interrogatories and charge precluded the jury from considering defendant's "market price" approach to the valuation of plaintiffs' interest in Presidential Motors. (Defendant argued—and the Court charged the jury—that they could value plaintiffs' interest in Presidential in 1970 by the amount plaintiffs had offered to pay for, and the amount defendant had agreed to sell, Presidential, that is $84,000). Special Interrogatory No. 6 asked the jurors:

> "What percentage figure did you find appropriate in reducing to present value plaintiffs' share of projected future profits in determining the value of plaintiffs' share of Presidential Motors?"

This question was presented merely to identify the discount rate, if any, the jury used in case the Appellate Court disagreed with our ruling that a 6% simple discount rate was not required. Taken into consideration the arguments of counsel and this Court's charge, we do not feel that the submission of this interrogatory prejudiced the jury's consid-

eration of both methods of valuing plaintiffs' interest. And, along these lines, the Court is not persuaded that its "fleeting" charge on the market value ($84,000) method of valuing plaintiffs' interest, given as it was in response to defendant's objection after the main charge, had less effect on the jury than the main charge. It could be said with equal force that what the jury heard last—and what was set apart from the rest—had a greater impact on them than material contained in the main charge.

The assertion that the jury's single damage verdict of $750,000 was grossly excessive concentrates on the market value approach to valuing plaintiffs' interest to the exclusion of the discounted profits approach of valuing that interest. The Court finds that the award was well within reasonable bounds.

The Court's refusal to grant defendant's motion for a bifurcated trial as to liability and damages at the eve of trial was not error requiring a new trial, because such a bifurcation would have unduly hampered the presentation of plaintiffs' liability case.

Any and all arguments made by defendant in support of their motion for a new trial which are not discussed are hereby rejected.

e. Defendant's Motion for a New Trial under Rule 60(b)(2).

Subsequent to the period allowed for the filing of motions for judgment n.o.v. and new trial, defendant moved for a new trial on the basis of newly discovered evidence. F.R.C.P. 60(b)(2). Defendant claims that in examining the time sheets of plaintiffs' counsel which this Court declared it could do in connection with a hearing on counsel fees, it discovered evidence that contradicts the testimony of plaintiff De Filippo at trial. The evidence which defendant offers is time sheets which show that De Filippo[16] consulted

16. The time sheets show that plaintiff Fleishman met with this same counsel two times prior to March 1, 1970.

attorney Jacob Siegal, a partner in plaintiffs' counsel's firm, on three separate occasions prior to March 1, 1970. At trial De Filippo testified that he did not "get an attorney" until after March 1, 1970.

Defendant contends that this new evidence entitles it to a new trial, presumably on the grounds that the new evidence might lead the jury to view the negotiations concerning a new dealership for plaintiffs that followed the ill-fated December 1969 negotiations over Presidential in a light more favorable to defendant. However, in order to justify a new trial under Rule 60(b)(2), the evidence in question must not have been previously discoverable by the exercise of reasonable diligence, must not merely discredit, contradict, or impeach a witness, and must be such as would probably change the outcome of the trial. *Giordano v. McCartney*, 385 F.2d 154 (1967); *Baird v. Aluminum Seal Co.*, 149 F. Supp. 874, *aff'd.* 250 F.2d 595 (3rd Cir. 1957).

We believe that defendant was not remiss in not finding this evidence before now. However, we feel that this evidence does not meet the other requirements established by the cases in this Circuit interpreting Rule 60(b)(2). The new evidence seems only to impeach the testimony of a witness, in this case the testimony of plaintiff De Filippo. And it seems unlikely that the new evidence would change the outcome of the case, since it relates to events which occurred after the dates on which the jury found defendant had committed the violations for which it was held liable.

For these reasons, defendant's motion for a new trial under Rule 60(b)(2) will be denied.

III. *Plaintiff's Motion for a New Trial*

Plaintiffs have moved for a new trial limited to the issue of damages on their anti-trust claim in the event and only in the event, that defendant is granted a new trial on this cause of action. Since defendant's motions for a new trial on this cause of action were denied, plaintiffs' contingent motion for a new trial will also be denied.

IV. *Plaintiffs' Motion for Reasonable Attorney Fees*

We come now to the matter of determining the amount of reasonable attorney fees to be paid by defendant to the plaintiffs as is authorized by Section 4 of the Clayton Act, 15 U.S.C. §4. Plaintiffs have requested that the Court award plaintiffs $500,000 in attorney fees.

At the threshold of any such determination is the question of what standard must be applied in arriving at an amount which represents reasonable attorney fees. Recent decisions of this and other circuits appear to have altered the traditional approach to fixing attorney fees. Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973); Merola v. Atlantic Richfield Co., 1974 CCH Trade Cases ¶74, 957 (3rd Cir. 1974); Detroit v. Grinnell Corp., 1974 CCH Trade Cases ¶74, 986 (2d Cir. 1974). Under the traditional standard, the number of hours spent by the successful attorney and his normal hourly billing rate were factors whose importance did not exceed such other factors as the complexity of the case or the ability of plaintiff's counsel. Noerr Motor Freight v. Eastern Railroad Pres. Conf., 166 F. Supp. 163 (E.D. Pa. 1958). Several courts have held that the total time spent and average hourly rate factors should receive less weight than other factors such as those mentioned above. TWA v. Hughes, 312 F. Supp. 478, 483 (S.D. N.Y. 1970) *aff'd.* 449 F.2d 51, *reversed on other grounds*, 409 U.S. 363 (1973); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258, 303 (M.D. Pa. 1965). However, in the *Lindy* case, cited *supra*, the Court of Appeals for the Third Circuit declared that the starting point for fixing reasonable attorney fees was the hours spent and the petitioning attorney's normal billing rate, and that the burden of showing both of these amounts was on the attorney(s) seeking the award. It is true that *Lindy* involved an award to be paid to plaintiff's attorneys from a fund received by plaintiff in settlement of an anti-trust case as compensation for services rendered a particular class of plaintiffs, whereas in the

present case attorney fees are not being sought on a quantum meruit basis for service rendered to the plaintiff class. But we still fee that *Lindy* sets down the only rational basis for arriving at reasonable attorney fees in the Section 4 situation. Even if *Lindy* had never been written, we would have followed a process similar to the one it outlines.

Lindy does not, of course, state that only total hours, and the amount plaintiff 's attorney normally charges for those hours, should be considered by a court in awarding attorney fees. The award is to be adjusted (in either direction) depending on the degree of contingency in plaintiff 's success and the quality of their attorneys' work. Among the factors to be considered in judging the latter are "the complexity and novelty of the issues presented, the quality of the work the judge has been able to observe, and the amount of the recovery obtained." 487 F.2d at 168.

Plaintiffs' counsel have submitted the total number of hours spent on this case by all members of their firm who worked on it. They have broken this total down into the number of hours devoted by each attorney, and have included the normal hourly rate charged by each of these attorneys. The total number of hours claimed by plaintiffs' attorneys is 3,270.9[17]; if these hours were to be compensated at these attorneys' normal billing rate, the plaintiffs would be owed $252,385.00.

Defendant disputes plaintiffs' figures as to the number of hours spent on this case. The main thrust of their attack centers upon the time spent immediately before and at trial by Messrs. Rabin and Baruch. Two Thousand Two (2,002) hours, or 59% of the total number of hours plaintiffs' counsel charged to the case were accounted for by five time slips which were prepared by counsel after the trial on the basis of their recollection. These time slips shows that lead counsel for plaintiffs estimated that they worked 11 hours for 6

17. Plaintiffs originally claimed to have put in 3,413.6 hours, but reduced this figure by 142.7 hours allegedly spent developing claims other than the anti-trust claim.

days a week, or 66 hours a week during the pretrial period (7 weeks) and 15 hours a day for 7 days a week, or 105 hours a week during the trial period (approx. 6 weeks). Defendant contends that counsels' maintaining such a schedule over the stated period of time is unlikely, and advances in support of its contention the register book of the building in which the law firm of Messrs. Rabin and Baruch is located. Entries in this register do not substantiate plaintiffs' attorneys' claims; they show that the attorneys were not checked in at times they have claimed they were working. Defendant also asserts that the fact that time slips for the pretrial and trial periods were not made contemporaneously renders them of little value.

While the register book seems to undercut the picture of a seven day a week, fifteen hour a day routine, we do not feel that we could begin subtracting hours from the total without litigating the register's reliability. This would be collateral to the issue before us, which is to determine a basis upon which reasonable attorney fees can be computed. We will accept plaintiffs' representations rather than involve the Court in the minutiae of plaintiffs' attorneys' method of operation. Likewise, while contemporaneous, detailed time sheets would be the best evidence, we will accept plaintiffs' attorneys' time slips for the pretrial and trial periods. The *Lindy* case was decided after most of these hours had been put in, and it would be unfair to punish these attorneys for not making the kind of records they had no reason to know they would need. Perhaps it needs no mention that future plaintiffs' counsel would be wise to keep contemporaneous time records.

Defendant's second and critical attack on plaintiffs' hours figure is grounded on plaintiffs' failure to separate the hours spent on their anti-trust claim from those spent on their contract and Dealer's Day in Court Act claims. Section 4 of the Clayton Act allows recovery of attorney fees for successful prosecution of the anti-trust claim, but there is no concept of "pendancy" which would gain plaintiffs an award for these other claims (neither of which was

successful). Plaintiffs have made a small deduction for legal research spent on these two claims[18] but claim that all hours spent developing these claims at or before trial are properly chargeable to the anti-trust claim. Defendant disputes this to the point of preparing a page-by-page analysis of each document involved in the case, including the transcript, in an attempt to ascertain the proportion of the hours claimed attributable to the anti-trust claim.

Plaintiffs' argument for attributing nearly all the hours they worked to the anti-trust claim is that this claim would have been unintelligible to the jury unless all the background and consequential facts, including those that gave rise to the contract and Dealer's Day in Court claims, were presented. Defendant's page by page analysis attributes only 52% of plaintiffs' case to proving the anti-trust claim. (This figure would be approximately 60% if hours related to damages from the loss of Chestnut Motors were allowed). Thus the relevancy of almost half of the hours claimed by plaintiffs' attorneys is in dispu e.

We are unwilling to either accept defendant's characterizations at face value, because of the questions of judgment and perspective involved, or to review every page involved in this case to make our own distinctions. Therefore, we will make our own distinctions based on a witness by witness rather than a page by page approach. Based on our perception of the witnesses' testimony at trial, we believe the testimony of Messrs. Rosenfeld, Pryor, Oswald, Brantz, and Clouser was less closely related to the anti-trust claim than it was to plaintiffs' other two claims. While it could be expected that these witnesses would have been deposed and called at trial in connection with the anti-trust claim, we feel justified in restricting plaintiffs' attorney fees to one-half of the time and energy spent deposing these witnesses or examining them at trial. While this method may be less exact than that proffered by defendant, we believe that it is as just in the long run as

18. See Footnote 17, *supra*.

well as constituting a simpler and more expedient approach to the problem of fixing reasonable attorney fees.

According to the pages of testimony and depositions allocated to these witnesses by the defendant, the exclusions made represent 476 pages out of a total of 6,945, or approximately one-fourteenth of the total.[19] An equivalent reduction in the amount normally charged by plaintiffs for their time would be $18,028. $\left(\frac{\$252,385}{14}\right)$[20] This would leave the total hours charged at plaintiffs' attorneys' normal billing rate at $234,357.

This analysis includes in plaintiffs' compensable hours the time spent on developing damages for plaintiffs' loss of Chestnut Motors. Defendant asserts that such time should not be included because the Court did not ultimately allow proof of such losses as part of the anti-trust claim. It is our opinion that, where evidence of these losses to show comparative losses at Presidential was not excluded until the middle of trial, and where evidence of such losses as the proximate result of the claimed anti-trust violation was not disallowed until the end of trial, any exclusion of the hours spent developing this evidence would be unfair. There was a reasonable basis for urging the consideration of damages from the loss of Chestnut as part of plaintiffs' anti-trust claim. TWA v. Hughes, 312 F. Supp. 478, 483, aff'd. 449 F. 2d 51; *reversed on other grounds*, 409 U.S. 363 (1973).

19. The breakdown of pages by witness is as follows:

Trial Testimony		*Depositions*	
Rosenfeld	42	Pryor	77
Pryor	247	Oswald	37
Oswald	76	Brantz	23
Brantz	57	Clouser	170
Clouser	222	Total	307
Total	644		

20. Of course, this arithmetic assumes that the billing rate spent on developing these witnesses' testimony was the average for all the work done.

To the amount reached above must be added an amount representative of the quality of plaintiffs' attorneys' work and the contingent nature of their success. This case was a long and complicated one, for which no groundwork was laid by a prior government indictment. Plaintiffs' counsel, faced with able and articulate counsel on the other side, succeeded in convincing the jury of the merit of their claim. We find that the sum of $150,000 will adequately compensate plaintiffs for the quality of their attorneys' work and the contingent nature of their success. The total award of attorney fees is, therefore, $384,357.00.

Dealer's Day in Court Act Claim

Plaintiffs have moved for a new trial, limited to the issue of damages, of their Dealer's Day in Court Act claim if and only if this Court grants defendant's motion for judgment n.o.v. on their anti-trust claim. Since the Court has denied defendant's motion of judgment n.o.v. on the anti-trust claim, plaintiffs' motion for a new trial will be denied. Similarly, defendant has moved for a new trial as to liability on the Dealer's Day in Court Act claim should plaintiffs be awarded a new trial as to damages. Since plaintiffs' new trial motion has been denied, defendant's will be also.

Breach of Contract Claim

I. *Plaintiffs' Motion for an Amended Judgment*

Plaintiffs request under Federal Rule of Civil Procedure 59(e) that we amend our entry of judgment[21] in favor of defendant on the breach of contract claim and instead enter judgment in favor of plaintiffs on this claim

21. As stated before, this Court's entry of judgment in favor of defendant more closely resembled the "moulding" of the verdict than it did judgment n.o.v. See FN. 3, *supra*.

in the sum of $1,250,000, which the jury found to be the extent of plaintiffs' damages from the breach.

In their arguments in support of this motion, plaintiffs neglect to mention the Statute of Frauds which the Court was enforcing in entering judgment in favor of defendant. Although in its answer to interrogatory No. 16 the jury found that Ford had entered into a contract with plaintiffs for the sale of Presidential, this contract was unenforceable because its subject matter included goods worth more than $500 and a lease in excess of three years and was unsigned by Ford. 12A P.S. 2-105 (1970) (U.C.C. provision relating to goods); 68 P.S. 250.201-250-203 (1965) (provision relating to leases).

However, this Court was inclined to follow the reasoning of the Pennsylvania courts that the Statute of Frauds should not be permitted to immunize fraudulent conduct.[22] Accordingly, the Court submitted to the jury the questions of whether defendant's agents had a duty under the circumstances to disclose certain facts to plaintiffs and whether they intentionally failed to perform this duty (interrogatories Nos. 14 and 15). The jury found that defendant's agents had not intentionally misled plaintiffs. Absent a finding of wilful misconduct, we could see no reason why the Statute of Frauds should not be enforced here.

Plaintiffs now argue that, although they knew it was an offer to purchase and not a contract they were signing on December 18, 1969, defendant's agents induced plaintiffs into believing that Leasco's approval would constitute Ford's acceptance and that no further formal procedures were necessary to make the contract binding. However, no mention was made at trial, nor in any of plaintiffs' trial memoranda concerning the application of the Statute of Frauds, of any misrepresentations, intentional or otherwise, concerning the manner in which Ford would accept plaintiffs' offer to purchase Presidential. The jury found a

22. See footnote 6, *supra*.

contract was entered into on December 18, 1969, conditioned only upon acceptance by Leaseco of the deferred rent plan, and plaintiffs cannot argue that the jury's answers support a theory of fraud which presumes that only an offer was made at that time.

II. *Defendant's Motion for a New Trial*

Defendant has moved for a new trial on the breach of contract claim should we decide to vacate judgment in its favor. Since we have not done so, defendant's new trial motion will be denied.

ORDER

AND NOW, to wit, this 14th day of June, 1974, the following dispositions are made of the motions filed by the parties in the above captioned matter:

1. Defendant's Motion for Judgment N.O.V. on Plaintiffs' anti-trust cause of action is DENIED;
2. Defendant's Motion for a New Trial on Plaintiffs' anti-trust cause of action is DENIED;
3. Defendant's Motion for Relief from Judgment under Rule 60(b)(2) is DENIED;
4. Plaintiffs' Motion to Amend Judgment with respect to their contract cause of action is DENIED;
5. Plaintiffs' Motion for a New Trial limited to the issue of damages on their Automobile Dealer's Day in Court Act cause of action is DENIED;
6. Plaintiffs' Motion for Allowance of Counsel Fees is GRANTED, and Plaintiffs are hereby awarded counsel fees in the amount of Three Hundred Eighty Four Thousand Three Hundred Fifty Seven ($384,-357.00) Dollars. AND IT IS SO ORDERED.

/s/
Clarence C. Newcomer, J.

Appendix D—Seventh Amendment to the Constitution of the United States

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Appendix E—Section 1 of the Sherman Act, 15 U.S.C. 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."